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Isn't it Ironic? The Central Paradox at the Heart of "Percentage Plans"

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Percentage plans are currently in use in three of our most populous states. These plans are admissions plans that rely on a student's class rank to determine admission to a state college or university. Such plans have been the subject of much debate and commentary, most of which has centered on the question of whether percentage plans are an adequate substitute for race-conscious affirmative action. But to date, few have focused on a reality that lies at the core of the plans themselves: percentage plans function effectively to diversify higher education only if secondary education remains firmly racially segregated. Percentage plans are a reflection of current day educational apartheid, highlighting the fact that much of our secondary educational system is both racially segregated and profoundly unequal. When a state attempts to construct racial diversity at the college and university level out of racial segregation and inequality at the secondary level, it is obligated to address the educational disparities throughout the system of public education. Policy proposals designed to remedy entrenched harms highlighted at the heart of percentage plans are explored.

I. INTRODUCTION

Racial segregation in education has been one of the most contentious issues in American race relations, and attempts to dismantle it have likewise been among the most controversial efforts in our history. Race-conscious, "preferential" affirmative action programs have been under attack, both in courts of law and in courts of public opinion, for a variety of reasons.¹ Against this backdrop, a trend is emerging: three of the most populous states in the union,

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¹ See Michelle Adams, *The Last Wave of Affirmative Action*, 1998 WIS. L. REV. 1395, 1402 (describing race-conscious, preferential affirmative action as selection mechanisms that include race-based quotas or preferences and distinguishing "soft," non-preferential forms of affirmative action that enhance the ability of minority group members to have access to and participate in particular educational or labor opportunities).

California, Florida, and Texas, have recently adopted "percentage plan" systems to select students for admission to public colleges and universities. As a general matter, percentage plans guarantee admission to public universities based upon a student's rank in her high school class.² In essence, percentage plans de-emphasize the role of standardized college entrance examinations in the admissions process, allowing high-achieving high school seniors to gain admission to state colleges or universities without regard to their SAT score.³ While the mechanics of these plans vary widely, they all share a key characteristic: they attempt to secure racial diversity in public higher education without the use of race-conscious, preferential affirmative action.

These plans have come under attack from both the left and the right ends of the political spectrum. For progressives, these plans are philosophically objectionable because they are not explicitly designed to remedy past discrimination by taking race into account in admissions decisions. Progressives also object to the practical outcome of percentage plans, which they believe actually reduce the number of minority students in public higher education. For conservatives, percentage plans are little more than a thinly-disguised attempt to achieve the same ends as race-conscious, preferential affirmative action. These plans are objectionable, then, because they benefit less-qualified minorities at the expense of more-qualified Whites. These political and legal arguments raise important issues, but these discussions have failed to focus on an astoundingly ironic reality at the heart of percentage plans: percentage plans can work if and only if secondary education remains firmly segregated. This irony raises profound questions not only about the arguments proffered by both the left and the right, but also about the very role of the state in securing a truly equal playing field for all Americans.

To delve into this paradox, it is instructive to review the objections to percentage plans raised by both the left and the right. Progressives argue that percentage plans reduce the overall number of Blacks and Hispanics enrolled in public higher education, and thus constitute a significant civil rights set-back.⁴ A majority of the members of the United States Commission on Civil Rights have issued a strongly-worded statement condemning percentage plans.⁵ These Commission members argue that percentage plans are an inadequate substitute for

² See *infra* Part II.

³ *Id.*

⁴ See, e.g., Mary Frances Berry, *How Percentage Plans Keep Minority Students Out of College*, CHRON. OF HIGHER EDUC., Aug. 4, 2000, at A48 (arguing with respect to the University of Texas at Austin that "the university now rejects minority students who would have been admitted under affirmative action and who, based on past experience, would have succeeded. Why? They happen to not be in the top 10 percent of their high-school classes").

⁵ U.S. COMM'N ON CIVIL RIGHTS, TOWARD AN UNDERSTANDING OF PERCENTAGE PLANS IN HIGHER EDUCATION: ARE THEY EFFECTIVE SUBSTITUTES FOR AFFIRMATIVE ACTION? (2000), available at <http://www.usccr.gov/percent/stmnt.htm> (on file with author) [hereinafter U.S. COMM'N ON CIVIL RIGHTS].

race-conscious affirmative action because they have not, and in their present form will not, secure racial diversity in public institutions of higher education, particularly at the graduate level.⁶ Under this theory, a race-conscious admissions system is superior because it attempts to mitigate the discriminatory effect of standardized tests on Blacks and Hispanics as well as other systemic problems that curb academic achievement, such as inferior and segregated secondary schools.⁷

Opponents of affirmative action argue that percentage plans are problematic for the very same reason as the previous race-conscious admissions regime: they admit less well-qualified minority group members at the expense of Whites.⁸ This view sees percentage plans as an attempt to achieve the same result as race-conscious affirmative action, but via a system of "'raceless' engineering [that]

⁶ Their statement was emphatic with respect to the need for affirmative action: "The percentage plans are experimental responses to the attacks on affirmative action. But they are no substitute for strong race-conscious affirmative action in higher education. What is required is a Supreme Court decision reaffirming *Bakke* and making affirmative action an imperative." *Id.* at 6.

⁷ See *id.*; see also Michael T. Nettles, Laura W. Perna & Catherine M. Millett, *Race and Testing in College Admissions*, in CHILLING ADMISSIONS: THE AFFIRMATIVE ACTION CRISIS AND THE SEARCH FOR ALTERNATIVES 105 (Gary Orfield & Edward Miller, eds., 1998). The authors stated that:

Regardless of the standardized test used, a smaller percentage of African Americans and Hispanics fall into the high end of the score distribution than of whites and Asians. Thus, a very small number of African Americans and Hispanics would be admitted to the most selective institutions if test scores were the dominant criterion.

Id.

⁸ See, e.g., Daniel Golden, *Some High Schools Finagle to Cram Kids Into Top 10% of Class*, WALL ST. J., May 15, 2000, at A1. Golden noted that:

Just as affirmative-action preferences used to, the class-rank law is breeding resentment by crowding out some white applicants. 'There's no amount of cheating Westlake [a suburban high school] can do to make up for how unfair the law is,' says Eric Renner, a senior who scored 1180 on his SATs, well above the national average of 1016 on a 1600-point scale, but 12 points below the Westlake mean.

Id.; see also Rick Bragg, *Minority Enrollment Rises in Florida College System*, N.Y. TIMES, Aug. 30, 2000, at A18 (reporting the statement of Sam J. Yarger, Dean of the School of Education at the University of Miami, who called Florida's percentage plan "Bush's Theory of Relativity," and asserted that the "real argument . . . is whether minorities are entitled to positions in the state university system when there is a nonminority applicant with better academic and other relevant credentials"); Jennifer Radcliffe, *College Admissions Rule Generates Debate About Equity; A Law That Guarantees Slots for Top Students at Texas Colleges Is Hailed and also Called Unfair*, THE FORT WORTH STAR-TELEGRAM, Oct. 22, 2000, at 4B ("Those who do not like the rule say that some high schools have higher academic standards than others. In top-notch schools, the top 25 percent of students are all well-prepared for college, they say.").

tolerates more mediocrity.”⁹ Of course, such a line of argument does not end there. If percentage plans can be viewed as a race-neutral means to achieve the same ends as race-conscious affirmative action, perhaps percentage plans violate the rights of White students. After all, the Equal Protection Clause is violated whenever state action is animated by a discriminatory purpose, such as the desire to advance the interests of Blacks and Hispanics by enhancing their representation at state colleges and universities that would invariably come at the expense of Whites and Asians.¹⁰ From this perspective, the fact that the state has chosen to use “raceless” means—a percentage plan—to effectuate discriminatory ends will not insulate it from constitutional challenge.¹¹ Indeed, proponents of this view might add that courts will view a facially neutral rule with added suspicion where such a rule comes shortly after the rejection of a facially discriminatory policy that had sought to achieve the same ends as the facially neutral rule.¹²

The critiques from both left and right, however, fail to address in a meaningful way the disturbing paradox, identified earlier, that is at the root of percentage plan schemes. I want to give that reality stark emphasis: percentage plans can only secure racial diversity in public colleges and universities because of significant racial segregation at the secondary school level. As one commentator pointedly observed: “Racial segregation among high schools is so entrenched that manipulating these percentages can produce for college admissions whatever racial composition politicians desire.”¹³ Governor Jeb Bush suggested as much in his remarks announcing the “One Florida Initiative”:

To further increase minority enrollment in the state university system, we will implement the Talented 20 Program. This program will guarantee state university admission to the top 20 percent of students in every Florida high school senior class, regardless of one’s SAT or ACT scores. Even with the elimination of race and ethnicity as a factor in admissions, the Talented 20 Program will result in a net increase in minority enrollment in the state university system.¹⁴

⁹ Shelby Steele, *Engineering Mediocrity*, WKLY. STANDARD, Oct. 30, 2000, at 41 (“Absent a hard-earned parity of skills and abilities between the races, ‘inclusion’ is necessarily a corruption.”).

¹⁰ See *Washington v. Davis*, 426 U.S. 229 (1976).

¹¹ See *Hunter v. Underwood*, 471 U.S. 222 (1985).

¹² See, e.g., *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 315 (2000) (striking down a policy of permitting students to pray before football games as a violation of the Establishment Clause and noting that the “evolution of the current policy [made it] reasonable to infer that the specific purpose of the policy was to preserve a popular ‘state-sponsored religious practice’” that had been struck down previously by the district court (quoting *Lee v. Weisman*, 505 U.S. 577, 596 (1992))); see also *Griffin v. County Sch. Bd. of Prince Edward County*, 377 U.S. 218 (1964).

¹³ Paul Attewell, *Mirage of Meritocracy*, AM. PROSPECT, July 17, 2000, at 12.

¹⁴ See Governor Jeb Bush, Announcement of the One Florida Initiative, at <http://>

How could Governor Bush have so confidently asserted that Florida's percentage plan would result in a "net increase" in minority enrollment in the state university system? The answer is clear: because of the certainty of racial segregation at the secondary school level. In a state where a significant proportion of a state's schools have a majority of minority group members, a percentage plan which selects from the top percentile of each of the state's high schools will yield racial diversity at the collegiate level, all other selection factors being equal.¹⁵ The United States Commission on Civil Rights identified this paradox and criticized Governor Bush's tacit assumptions. In its statement criticizing Governor Bush for "voluntarily" instituting the "One Florida Initiative," the Commission's majority made the following observation: "The Plan is an unprovoked stealth acknowledgment—and acceptance—that the existing school and housing segregation will never change and that longstanding efforts to remedy the race discrimination that was legal in Florida have been abandoned."¹⁶ Given this, even a casual observer might remark at the irony of the state's position. Percentage plans attempt to enhance racial diversity in the state's colleges and universities by taking advantage of the heavily racially segregated nature of the state's high schools; they attempt to create racial diversity in college by maintaining racial segregation in high school. The reality is that percentage plans can only succeed with their articulated aim "[b]ecause racial segregation dominates much of the American landscape."¹⁷

It is not enough to identify this reality as ironic, because its devastating implications run much deeper than mere irony. When the state institutes a mechanism that attempts to create racial diversity in public higher education out of racial segregation in secondary education, it is fallacious to perceive that mechanism as just another affirmative action plan. Instead, it is more accurate to

www.myflorida.com/myflorida/government/learn/one_florida/announcementInitiative.html (Nov. 9, 1999) [hereinafter *Announcement*].

¹⁵ See Barry Klein and Stephen Hegarty, *College Program Has Little Impact*, ST. PETERSBURG TIMES, Sept. 3, 2000, at 1A (reporting that while "different in some respects, the Florida and Texas plans share a critical element: Their impact is directly proportional to the degree in which their high schools are segregated"). See generally Gary Orfield & John T. Yun, *Resegregation in American Schools*, The Civil Rights Project, Harvard University (June 1999), available at <http://www.law.harvard.edu/civilrights/publications/resegregation99.html> (last visited Nov. 15, 2001) (on file with author) [hereinafter *Orfield & Yun Study*]. The Orfield and Yun study found, as a general matter, that school segregation has increased substantially in the South since the late 1980s. *Id.* at 11–13. With respect to Florida, the study found that the state was among the most segregated in the nation for Black and Latino students. *Id.* at 20. For instance, in 1996–1997 almost 30% of Florida's Black and Latino students attended schools that were 90–100% minority. *Id.* at 20, 23–24.

¹⁶ U.S. COMM'N ON CIVIL RIGHTS, *supra* note 5. In examining the extent of racial diversity in the Texas system of higher education post-*Hopwood*, the Commission also observed that: "[T]hese results show that a color-blind law in a racially segregated primary and secondary public school environment can promote some diversity in undergraduate admissions." *Id.* at 3.

¹⁷ *Id.* at 6.

describe percentage plans as a reflection of current day educational apartheid. Percentage plans are made necessary and indeed can only be perceived as a viable affirmative action mechanism because they function against a background educational system that is both racially segregated and profoundly unequal. Thus, percentage plans are not just a newfangled affirmative action device. Properly reconceived, they are a barometer of the inability of certain segments of the student population to compete for admission to state colleges and universities. But why does this shift in emphasis, this exercise in renaming, matter?

It matters because when a state institutes a percentage plan it is explicitly acknowledging and reifying the deleterious effects of a separate and unequal educational system. This thesis is borne out in several ways. First, when a state institutes a percentage plan, it is implicitly relying on the racially segregated nature of the secondary schools to achieve the desired level of racial diversity at the higher education level. However, we cannot ignore the fact that the state itself played a role in creating and maintaining the racially segregated school system in the first place. The state as an entity is inextricably linked to the segregated system of primary and secondary education that it relies upon in creating its percentage plan.

Second, in creating percentage plans, the state is also recognizing the fact that there is systematic disadvantage associated with attending racially segregated secondary schools. With a percentage plan, the focus of the admissions determination now becomes the student's performance relative to other students in her class, not as relative to other students in other high schools in other parts of the city, metropolitan area, or state. Percentage plans thus "localize" competition, and indeed, that is often seen as a virtue.¹⁸ But a localized focus should highlight rather than obscure the bigger picture. The reality is that percentage plans were designed to sidestep an unfortunate truth. Some high school students, often educated in urban and racially segregated environments, are less prepared academically than other high school students, often educated in suburban and racially segregated environments, to compete for admission to the state's system of higher education. It is impossible to consider these students' lack of preparation without focusing on its proximate cause: mutually reinforcing racial segregation in our schools and in our residential areas and the interrelationship among racial segregation, poverty, and disadvantage.

Exactly which students tend to be less academically prepared? Students in schools where race and poverty are concentrated, which tend to be predominantly Black and Hispanic; students in schools that have been consistently under-funded relative to other schools in the state, which tend to be predominantly Black and Hispanic; students in schools with less access to advanced placement and college preparatory courses, which tend to be predominantly Black and Hispanic, and

¹⁸ Indeed, proponents stress how percentage plans reward "merit" and emphasize "fairness" because similarly situated students compete against each other for admission to the state's system of higher education. *See infra* Part II.

students in schools that are undergoing a process of "resegregation," which tend to be predominantly Black and Hispanic. Segregated residential areas reinforce and segregate our schools; segregated schools reinforce and segregate our residential areas; and poverty and associated ills reinforce systematic disadvantage, whose unhappy byproduct is the disparate level of academic preparedness we currently observe.

Perhaps most importantly, percentage plans reflect not only the state's recognition of racial segregation and associated systematic disadvantage, but such plans also reify and continue those ills by implementing a mechanism intended to achieve racial diversity upon a foundation of inequality. I argue that the state may not blithely create a system intended to achieve racial diversity in higher education that takes as its basis and operating reality, systemic disadvantage, racial segregation, and educational apartheid without seriously attempting to ameliorate the sources of those problems. I argue that when the state attempts to construct racial diversity out of racial segregation and inequality, it is obligated to do something more than tinker with the mechanics of percentage plans to increase the number of minority students in public universities. Along with its recognition and acknowledgement of the deep ironies highlighted by percentage plans, the state must accept some level of responsibility for righting these wrongs.

In this article, I do not argue that the state's obligation rises to the level of a federal Constitutional dimension; rather, I concede that the Supreme Court's interpretation of the federal constitution in a variety of areas would make such an argument exceedingly difficult.¹⁹ Instead, the nature of the state's obligation is morally, ethically, and, I hope ultimately, politically compelling.²⁰ Our national discussion of the propriety of percentage plans is just beginning, and thus this is the appropriate moment to re-characterize the nature of that debate. My aim here is to re-cast that discussion and bring the debate onto a different plane entirely. We must move away from a compressed debate on the pros and cons of percentage plans as a substitute affirmative action measure and move toward a fuller appreciation of percentage plans as reflective of deep educational disparities and the state's continuing obligation to solve them.

Part II of this article describes "percentage plans" by examining their adoption and their particular mechanics in three highly populated states: Texas,

¹⁹ See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37 (1973) (holding that education is not a fundamental right).

²⁰ It is true that a particular state's constitution might well be interpreted to create a legal obligation on the state to rectify the state of affairs that I will describe within. See *infra* Part II.B. My focus here, however, is upon describing the state's role in creating the current state of affairs, probing the constitutionality of percentage plans, and on arguing that the state has an obligation to rectify our segregated and inferior secondary school system because of fundamental notions of fairness. I leave for others an examination of the actual litigation possibilities that state constitutions present. See, e.g., John Powell, *Segregation and Educational Inadequacy in Twin Cities Public Schools*, 17 HAMLINE J. PUB. L. & POL'Y 337, 361-402 (1996).

California, and Florida. This discussion suggests that while the mechanics of the plans differ, they share a desire to reward academic achievement in high school and enhance racial diversity at the college and university level in the absence of more traditional forms of affirmative action. This section also shows how the reality of racial segregation in secondary schools is critical to the architecture of the percentage plan programs. Part III of this article explores the historical underpinnings of racial segregation in education and the inter-related nature of educational and residential segregation. It also establishes the states' role in creating and maintaining this segregation, and places percentage plans in historical context among other efforts to remedy discrimination in education. Part IV of this article explores the legal context of percentage plans, and describes the likely outcome of potential constitutional challenges to percentage plan programs. Part V of this article describes the philosophical and moral challenges posed by percentage plans, and explores the role of the state as a moral actor. Finally, Part VI of this article provides policy proposals designed to remedy the entrenched harms that we find highlighted at the heart of percentage plans.

II. "PERCENTAGE PLANS": BUILDING RACIALLY DIVERSE PUBLIC UNIVERSITIES ON A FOUNDATION OF RACIALLY SEGREGATED SECONDARY SCHOOLS

Defined at the most basic level, a "percentage plan" is a method for determining admission to a particular state's university system.²¹ Percentage plans link admission to the state's university system to a student's academic performance in high school. Under a percentage plan, a student attaining a grade point average high enough to place her in some fixed percentile of her class is rewarded for that achievement by gaining admission to her state university system.²² Presently, Texas, California, and Florida have some version of a percentage plan in place to determine admission to their state universities and colleges. These states have adopted percentage plans in reaction to a variety of stimuli, and the plans themselves vary significantly in terms of their mechanics, effect, and implementation. What they share, however, is a mechanism that provides admission or eligibility to the state's colleges and universities that simultaneously attempts to ensure both "merit" and racial diversity.

²¹ See Editorial Desk, *Affirmative Geography*, WASH. POST, Nov. 29, 1999, at A22 ("[Percentage plans] offer automatic admission [to state colleges and universities] to the top graduates of every high school in the state.").

²² See Editorial Desk, *After Affirmative Action*, N.Y. TIMES, May 20, 2000, at A14 (defining a percentage plan as an admissions system under which "students who achieve a specified ranking in their high school graduating classes are guaranteed admission to state colleges").

A. Texas: The Ten Percent Plan

In *Hopwood v. Texas*,²³ the United States Court of Appeals for the Fifth Circuit ruled that the University of Texas (UT) School of Law's admissions program violated the Fourteenth Amendment by providing "preferences" to "less-qualified" Black and Mexican American applicants at the expense of "more-qualified" White applicants.²⁴ The effect of the *Hopwood* ruling was to prohibit the use of race-conscious, preferential affirmative action in university admissions in the state of Texas.²⁵ The immediate result of the *Hopwood* decision was to decrease Black and Mexican American enrollment at the state's most prestigious campuses.²⁶

In response to the *Hopwood* decision, Governor George W. Bush signed House Bill No. 588 into law in 1997, creating the Texas "Ten Percent Plan."²⁷ The mechanics of the Ten Percent Plan are quite simple. Under the law, admission to any state undergraduate college or university is guaranteed to all public and private high school students in the state who graduate with a grade point average in the top ten percent of their high school's graduating class.²⁸ Under the Ten Percent Plan, the state discontinued the use of a minimum standardized test score (such as the SAT) as part of the admissions criterion for students who graduated in the top ten percent of their high school class.²⁹

²³ 78 F.3d 932, 945-46 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996).

²⁴ *See id.* at 935-38.

²⁵ *See* Mary Ann Roser, *Race Ruling Stumps Universities; 8 Months After Hopwood Decision, Texas Education Officials Have Few Ideas On How to Retain Minority Students*, AUSTIN AM.-STATESMEN, Nov. 13, 1996, at B1.

²⁶ *See* TEXAS HIGHER EDUCATION COORDINATING BOARD, REPORT ON THE EFFECTS OF THE HOPWOOD DECISION ON MINORITY APPLICATIONS, OFFERS, AND ENROLLMENTS AT PUBLIC INSTITUTIONS OF HIGHER EDUCATION IN TEXAS 3-4, (1998) (explaining that UT Austin and Texas A&M, Texas' most prestigious schools, experienced "significant declines in offers and enrollments in 1997 for African-Americans and Hispanics") (on file with author).

²⁷ TEX. EDUC. CODE ANN. § 51.803 (Supp. 2001). At a public hearing to consider the Bill, Professor Gerald Torres recognized the relationship between H.B. 588 and *Hopwood*, and stated: "*Hopwood* created the crisis people felt in higher education. With every crisis there is also an opportunity. The legislature has grasped that opportunity in HB 588." Audio tape: Hearings on H.B. 588 Before the House Committee On Higher Education, held by the Texas 75th Legislature (May 18, 1997) (statement of Professor Gerald Torres, University of Texas Law School) (on file with author) [hereinafter *Texas House Committee Hearings*]; *see also* Danielle Holley & Delia Spencer, *The Texas Ten Percent Plan*, 34 HARV. C.R.-C.L. L. REV. 245, 253 (1999) (asserting that Representative Irma Rangel introduced the Bill in direct response to the *Hopwood* decision).

²⁸ TEX. EDUC. CODE ANN. § 51.803 (Supp. 2001). The Texas Ten Percent Plan, like the plans in California and Florida, applies solely to undergraduate programs; percentage plans' failure to address graduate programs is a significant flaw. *See* U.S. COMM'N ON CIVIL RIGHTS, *supra* note 5 (asserting that percentage plans' "inattention to law schools, medical schools, and other graduate and professional schools" is a "major problem").

²⁹ UNIVERSITY OF TEXAS, IMPLEMENTATION AND RESULTS OF HB 588 AT THE UNIVERSITY

Consequently, the Ten Percent Plan has its largest impact on the most selective schools within the state that had previously relied on standardized test scores as an admissions selection mechanism.³⁰ As some commentators have noted, the importance of recruitment and outreach to eligible minority students is of vital importance if diversity is to be achieved under the Ten Percent Plan, since students must first apply to a particular state college or university in order to be accepted.³¹

In signing House Bill No. 588 into law, Governor Bush emphasized that the Ten Percent Plan would reward the values of effort, fortitude, and merit. Indeed, his signing statement reflects those views:

This legislation says to Texas high school students, if you work and study hard enough to rank in the top ten percent of your high school class, you can earn the right to go to college. We want all our students in Texas to have a fair shot at achieving their dreams and this legislation gives them that fair shot if they are willing to work for it. We want our universities to reach out to students from all walks of life, and this legislation gives them the flexibility to do just that.³²

But the bill was intended to do more than reward hard work and superior academic performance. The bill was also clearly intended to promote racial diversity in the state's colleges and universities in the absence of race-conscious affirmative action. For instance, at the first hearing before the Texas State Senate to consider the bill, the Deputy Commissioner of the Texas Higher Education Coordinating Board stated: "What we believe is that this kind of bill would . . . increase the pool, the diversity of the pool of students that's available to institutions in Texas, particularly the most selective institutions."³³ There is little doubt that the state legislature was aware of the fact that the Ten Percent Plan's ability to achieve racial diversity at the college and university level was closely

OF TEXAS AT AUSTIN REPORT NUMBER 2: ACADEMIC PERFORMANCE AND PERSISTENCE OF TOP 10% STUDENTS ACADEMIC YEAR 1998-99 AND FALL 1999 (April 2000), *available at* <http://www.utexas.edu/student/research/reports/admissions/HB5882000329.html>. See TEX. EDUC. CODE ANN. § 51.803 (Supp. 2001), *available at* Texas Legislature Online, <http://www.capitol.state.tx.us/> (last visited May 26, 2000).

³⁰ See T. Vance McMahan & Don R. Willett, *Hope from Hopwood: Charting a Positive Civil Rights Course for Texas and the Nation*, 10 STAN. L. & POL'Y REV. 163, 167 (1999) ("The law applies across-the-board to all of Texas' 35 state universities but is aimed chiefly at prestigious schools like UT, which have a cap on enrollment, not less-selective schools that routinely accept lower-ranking students.").

³¹ See *id.*

³² Office of the Governor of Texas, *Governor Signs Admissions Bill* (May 20, 1997), *at* <http://www.governor.state.tx.us/message/Record97/05-20-97castration,admissions.html> (last visited May 26, 2000) (on file with author).

³³ Audio tape: Hearings on H.B. 588 Before the Texas State Senate, held by the Texas 75th Legislature (Apr. 30, 1997) (statement of Don Brown, Deputy Commissioner of Texas Higher Education Coordinating Board) (on file with author).

linked to racial segregation at the secondary school level. At a meeting before the House Committee on Higher Education, one witness frankly explained how the mechanics of the Ten Percent Plan would provide racial diversity in Texas' college and universities:

The 10% rank is going to be particularly efficacious in the state of Texas ironically as a result of the extreme racial isolation of its high schools. Because of that racial isolation, many rural and urban minority schools will have a number of minority students in the top 10% of their class who, I believe, will have an opportunity to be considered for admissions at flagship institutions where they are not presently able to do so because of the lower test scores these groups tend to present.³⁴

Recent evidence suggests that the Ten Percent Plan has met with some success in increasing the number of Blacks and Hispanics enrolled at the state's most prestigious schools since the elimination of race-conscious affirmative action.³⁵ Such success is largely the result of the state's concerted effort in the wake of the *Hopwood* decision to strengthen outreach and recruitment efforts to the minority community, and to provide enhanced need-based financial aid.³⁶ The

³⁴ See *Texas House Committee Hearings*, *supra* note 27 (statement of Michael Olivas, University of Houston law professor and former trustee of the College Board). At the same hearing, another witness, UT History Professor David Montejano, testified that he was confident that the bill would maintain a "minimum floor of diversity without the use of race or ethnic criteria." *Id.* (statement of Dr. David Montejano, Professor of History at UT Austin). Subsequently, in an interview concerning the Ten Percent Plan, Montegano stated that although the bill was "color-blind," "it uses our bitter history of segregation to promote diversity." In the same interview he described Texas' state of segregation as so severe that the high schools are "almost entirely white or black or brown." William E. Forbath & Gerald Torres, *Merit and Diversity After Hopwood*, 10 STAN. L. & POL'Y REV. 185, 185 (1999).

³⁵ See UNIVERSITY OF TEXAS, IMPLEMENTATION AND RESULTS OF HB 588 AT THE UNIVERSITY OF TEXAS AT AUSTIN REPORT NUMBER 3: ACADEMIC PERFORMANCE AND PERSISTENCE OF TOP 10% STUDENTS ACADEMIC YEAR 1999-2000 AND FALL 2000, available at <http://www.utexas.edu/student/research/reports/admissions/HB588-report3.html> (Nov. 2000). This report stated that:

In terms of percentages of minorities enrolled, the entering freshman class of 2000 was as diverse as the entering class of 1996. The percentage of whites fell from 65% to 63%, while African Americans held steady at 4%. Hispanics fell slightly from 14% to 13%. Asian American and foreign students showed the greatest percentage increases.

Id. It should be noted that these very recent entering class figures, while consistent with pre-*Hopwood* statistics, are not consistent with the proportion of African Americans and Hispanics in the state. *Bush Uses 'Fuzzy Math' on Diversity Data, Says Civil Rights Group*, U.S. NEWswire, Oct. 19, 2000, LEXIS, Nexis Library, Newswire File (reporting from an Americans for a Fair Chance press release). Therefore, the University of Texas still is "not representative of the population." *Id.*

³⁶ The state has recognized the need to actively recruit minority students if the Ten Percent Plan is to achieve its intended aim. For example, in October 1998, The Texas Higher Education

state's responsiveness to the lack of minority representation in its colleges and universities is laudable and underscores the fact that the Ten Percent Plan was created for that purpose. The state's efforts, however, have focused primarily on recruitment and retention; they have not extended to either desegregating the state's secondary schools or to meaningfully changing academic achievement levels for students outside of the top ten percent of their graduating class.

B. California's Approach to Percentage Plans

In 1995, Governor Pete Wilson of California issued an Executive Order decreeing that the University of California (UC) would not use race, religion, sex, color, ethnicity, or national origin as criteria for admission to any program of study.³⁷ In the following year, a majority of the citizens of the state of California approved Proposition 209, the "California Civil Rights Initiative," which amended the state constitution to eliminate public race- and gender-based affirmative action programs.³⁸ Proposition 209 eliminated state and local government affirmative action programs in the areas of public employment,

Coalition formed the Texas Commission on a Representative Student Body and charged it with tracking higher education programs to prevent the potential segregating effects of *Hopwood*. See Texas Commission on a Representative Student Body (TCRSB), Brief History of the Higher Education Coalition, at <http://www.uhsa.uh.edu/TCRSB/TCHis.html> (last visited May 31, 2000). The TCRSB recognized numerous barriers to recruiting minority students and recommended the creation of a fund to finance recruitment and that the legislature appropriate funds for student aid based on need. See TCRSB, Overview of Findings, at <http://www.uhsa.uh.edu/TCRSB/overview.html> (last visited May 31, 2000). In 1999, the Texas legislature passed a statute requiring that the Boards of Trustees for each school district require that each high school within the district post notices in guidance counselors' offices providing information regarding the Ten Percent Plan. See S.B. 510, Texas 76th Legis. (1999), available at Texas Legislature Online, <http://www.capitol.state.tx.us/> (last modified Feb. 2, 2000). Finally, in April 2000, the Texas Higher Education Coordinating Board issued a Uniform Recruitment and Retention Strategy recommending that all public institutions of higher education institute a variety of enrollment activities intended to "identify, attract, enroll and retain students who reflect the population of this state." TEXAS HIGHER EDUCATION COORDINATING BOARD, UNIFORM RECRUITMENT AND RETENTION STRATEGY: A PLAN TO IDENTIFY, ATTRACT, ENROLL AND RETAIN STUDENTS WHO REFLECT THE POPULATION OF TEXAS, at title page (2000), at <http://www.thecb.state.tx.us/>; see TEX. EDUC. CODE ANN. § 61.086 (Supp. 2001). The state has also begun the Longhorn Opportunity Scholars Program which "identifies high schools in poor areas that traditionally have not sent many students to the University of Texas or Texas A&M University and grants scholarships to the students who graduate in the top 10 percent of those schools." Hilary Hurd, *Texas' Ten Percent Plan Has Boosted Minority Enrollment*, BLACK ISSUES IN HIGHER EDUC., Oct. 26, 2000, at 24.

³⁷ Executive Order W 124-95 was issued on June 1, 1995 and was entitled "End Preferential Treatment and to Promote Individual Opportunity Based on Merit." The Regents, Policy Ensuring Equal Treatment—Admissions (SP-1), at <http://www.ucop.edu/regents/policies/sp1.html> (last visited May 23, 2000).

³⁸ See *Coalition for Econ. Equity v. Wilson*, 122 F.3d 692, 696–97 (9th Cir. 1997).

public education, and public contracting to the extent such programs granted preferential treatment based on race, sex, color, ethnicity or national origin.³⁹

Proposition 209 had an immediate impact on the numbers of Black and Hispanic students admitted to the UC system. While the number of Black and Hispanic students admitted to undergraduate programs in the UC system fell only slightly in the first year after Proposition 209 went into effect, there were significant declines at the system's flagship campuses.⁴⁰ Against this backdrop, in early 1998, a UC official recommended that the University of California Board of Regents adopt a plan that would admit "the top four percent of each high school class" in order to "combat the inequality of educational opportunities across the state."⁴¹ During a series of Regents meetings, the proposed plan was characterized both as an effort to ensure geographic diversity, thereby strengthening the UC's "historical commitment to represent in its student body the entire population of the State of California," and as a mechanism that might stimulate weaker schools to better prepare their students for college.⁴²

State officials who discussed the propriety of such a plan, however, were unsure whether the plan would in fact enhance racial diversity in the University of California system.⁴³ At best, the impact on diversity was predicted to be

³⁹ See California Secretary of State, Analysis of Proposition 209, at <http://vote96.ss.ca.gov/Vote96/html/BP/209analysis.htm> (last visited June 14, 2000).

⁴⁰ See Ethan Bronner, *Fewer Minorities Entering University of California*, N.Y. TIMES, May 21, 1998, at A28 (reporting that far "fewer black and Hispanic students will enroll as freshman at the University of California's most competitive campuses . . . although their numbers will drop only slightly throughout the state system. . ."). Recent reports suggest that minority enrollment at California flagship schools has not returned to its pre-Proposition 209 level. See Jerome Karabel, *Commentary: Affirmative Action Had Real Merit*, L.A. TIMES, July 10, 2000, at B-7 ("There . . . has been a precipitous decline in minority undergraduates at UCLA and at the flagship Berkeley campus, where black and Mexican American enrollments have been reduced to their lowest levels in more than 25 years."). More specifically, at UC-Berkeley in 1999, "[t]he figures for minority enrollment remain[ed] lower than [in] 1997 . . . the last group of students enrolled before [Proposition 209]." Anne Benjaminson, *Minority Enrollment Rises at UC-Berkeley*, DAILY CALIFORNIAN VIA U-WIRE, Dec. 1, 1999, LEXIS, Nexis Library, UNIVERSITY WIRE File.

⁴¹ *Senate Looks into Making Top 4 Percent of Students in Each High School UC-Eligible*, NOTICE: A PUBLICATION OF THE ACADEMIC SENATE (University of California, Oakland, Cal.), Mar. 1998, at 1 (quoting UC Academic Senate Board of Admissions and Relations with Schools Chair, Keith Widaman).

⁴² Regents of the University of California, Minutes of the Committee on Educational Policy (Feb. 18, 1999), available at <http://www.ucop.edu/regents/minutes/> (paraphrasing Professor Keith Widaman) [hereinafter Regents Minutes February]; see also Regents of the University of California, Minutes of the Committee on Educational Policy (Mar. 18, 1999), available at <http://www.ucop.edu/regents/minutes/> (statement of Governor Gray Davis) [hereinafter Regents Minutes March].

⁴³ For instance, at a March 1999 Board of Regents meeting, Governor Gray Davis reportedly said that the "proposal will add about 1,800 more students who will enroll. Of those 1,800, about half will be people of color, so the proposal may or may not affect the overall

“modest.”⁴⁴ Indeed, it is not clear that all of the Regents believed it appropriate to design an eligibility plan with the specific aim of enhancing racial diversity. At least one member of the University of California Board of Regents, Ward Connerly, took the position that to the extent that the plan attempted to achieve such an aim, it would run afoul of Proposition 209.⁴⁵ In March 1999, the University of California Regents adopted the plan, and created a new “path to eligibility,” that allowed the “top four percent of students in each California public high school [to] be designated UC-eligible and offered admission at one of eight general campuses.”⁴⁶ This new path to eligibility or “Eligibility in the Local Context” plan became effective for all public high schools students submitting applications for admission to UC undergraduate schools for the fall of 2001.⁴⁷

More recently, the President of the University of California has proposed a “12.5 percent plan” or “dual admissions program” that is explicitly intended to increase racial diversity within the UC system.⁴⁸ This plan is intended to “send a clear signal to high-achieving students in low-performing high schools, many of whom are underrepresented minorities, that they have a clear path to a UC degree.”⁴⁹ The key aspect of the proposed 12.5 percent program is that it

diversity at the University of California.” Regents Minutes March, *supra* note 42, at 5.

⁴⁴ See CAL. NOTES (Univ. of Cal.), Mar. 1999 (reporting that “[a] UC analysis indicates that the top four percent path would make eligible an additional 3,600 students who would not otherwise qualify. Of those, it is estimated that 56 percent would be white; 11 percent Asian American; 20 percent, Chicano/Latino[;] and 5 percent, African American”), available at www.ucop.edu/pathways/calnotes/mar99_eligibility.html.

⁴⁵ Connerly’s position with respect to the 4% plan was quite clear: “Regent Connerly believed that in doing anything that is designed to affect the racial outcome of the student body, the University would violate Proposition 209 and thus be open to lawsuits.” See Regents Minutes, *supra* note 42, Feb. 18, 1999, at 14.

⁴⁶ *Regents Adopt 4% Plan, Arts Requirement*, CAL. NOTES (Univ. of Cal.), Apr. 1999, available at www.ucop.edu/pathways/calnotes/apr99_plan.html.

⁴⁷ *Paths to UC Eligibility for Freshman*, CAL. NOTES (Univ. of Cal.), Sept. 1999, available at www.ucop.edu/pathways/calnotes/sep99_plan.html. Eligibility in the Local Context was one of three pathways to eligibility for prospective freshmen submitting applications to UC schools. *Id.* (explaining that there are “three paths to UC eligibility for prospective freshman: (1) superior academic performance in a statewide context; (2) superior performance on examinations alone; and (3) superior academic performance in the local context”). The Eligibility in the Local Context Program functions as follows: Students ranking in the top four percent of their high school class following their junior year are required to submit an application for undergraduate admission and to designate a preferred UC campus. See *id.* There is, however, no guarantee that students will be admitted to their “first choice” school. This is the case because “[i]ndividual campus selection policies remain unchanged, and the ELC students will be evaluated under those policies along with other students in the applicant pool.” See *Nuts and Bolts Information About New Local Context Eligibility Path for Freshman*, CAL. NOTES (Univ. of Cal.), Sept. 1999, available at www.ucop.edu/pathways/calnotes/sep99_plan.html.

⁴⁸ See Karen W. Arenson, *California Proposal Aims To Improve College Diversity*, N.Y. TIMES, Sept. 22, 2000, at A16.

⁴⁹ Letter from Richard C. Atkinson, President, University of California, to Michael

recognizes the link between high concentrations of Black, Hispanic, and Native American students in particular high schools and attendant disadvantage. In asking that the University of California Academic Counsel consider the proposed 12.5 percent plan, the President of the University of California made the following assertion:

The dual admission [12.5 percent] plan would result in other benefits to the State: There is a high concentration of underrepresented minorities in low-performing high schools. Consequently, significantly more African American, Hispanic and Native American students would be given the opportunity to earn a UC degree.⁵⁰

In some respects the proposed 12.5 percent plan is very similar to the four percent plan because the ability to gain admission to a UC school is based on high school rank.⁵¹ However, under the 12.5 percent plan, qualifying students are not made automatically eligible for admission to a UC campus. Instead, under the new proposal, students ranking below the top four but above the 12.5 percent of their high school class would be simultaneously admitted to a California community college and a UC campus.⁵² Such students would then be required to satisfactorily complete their freshman and sophomore requirements at the community college before they were allowed to "complete their upper-division studies at the UC campus."⁵³ In July 2001, the University of California Regents approved the Dual Admissions Program.⁵⁴

C. Florida: The Talented 20 Program

Unlike the percentage plans adopted in Texas and California, Florida's percentage plan arose out of Governor Jeb Bush's "voluntary" decision to eliminate race-conscious affirmative action.⁵⁵ On November 9, 1999, Governor Jeb Bush signed Executive Order 99-281 as part of his "One Florida Initiative."⁵⁶

Cowan, Chair, University of California Academic Council (Sept. 20, 2000), at www.ucop.edu/ucophome/pres/comments/cowanltr.html [hereinafter Atkinson Letter].

⁵⁰ *Id.*

⁵¹ See Office of the President of the University of California, Questions and Answers about the Proposed "Dual Admissions" Plan, at <http://www.ucop.edu/ucophome/pres/comments/dualq&a.html> (last visited Nov. 19, 2001) (describing the 12.5 percent plan as "an expansion of the current 4% by high school [plan]").

⁵² See *id.*

⁵³ Atkinson Letter, *supra* note 49.

⁵⁴ University of California Board of Regents Approved Actions Academic Year 2000-2001, at <http://www.ucop.edu/regents/aar/aar.html> (last visited August 15, 2001).

⁵⁵ See Rick Bragg, *supra* note 8, at A18 ("Unlike in Texas and California, which have similar programs that produced initial drops in minority enrollment, 'we did not wait for a legal challenge or a ballot initiative,' said Mr. Bush.")

⁵⁶ Exec. Order No. 99-281 (1999), available at http://www.state.fl.us/eog/executive_orders/1999/november/eo99-281.html (last visited June 7, 2000); see also

Executive Order 99-281 eliminated the use of "racial or gender set-asides, preferences and quotas" in government employment, state contracting, and higher education.⁵⁷ As part of the same One Florida Initiative, Governor Bush also announced the "Talented 20 Program," a new avenue for admission to the state university system.⁵⁸ The program's mechanics are simple. Under the Talented 20 Program, admission to an undergraduate college or university within the state system of higher education is guaranteed to students ranking in the top twenty percent of their class at the end of their seventh semester in high school.⁵⁹

There is no real question that the Talented 20 Program was designed to "increase minority enrollment in the state university system."⁶⁰ The Talented 20 Program was proposed at the same time that Governor Bush eliminated the use of race-conscious affirmative action. The Governor's statements were quite explicit: the Talented 20 Program was created in an attempt to achieve racial diversity at the university level without the use of race-conscious affirmative action.⁶¹ As with the other percentage plans previously explored, the question is: would the utilization of a percentage plan yield such a result? Some of the statements made in opposition to the Talented 20 Program are instructive.

The One Florida Initiative was not quietly received; Governor Bush's

Announcement, supra note 14.

⁵⁷ Exec. Order No. 99-281 (1999), available at http://www.state.fl.us/eog/executive_orders/1999/november/eo99-281.html (last visited June 7, 2000). It should be noted that, prior to Bush's proposal, the University of North Florida and Florida State University had already eliminated the use of race as a factor in admissions. See *Announcement, supra* note 14.

⁵⁸ *Announcement, supra* note 14. As part of the One Florida Initiative, Governor Bush also made a variety of proposals. First, he proposed a forty-three percent increase for need-based financial aid so that those "in the top 20 percent with need . . . may take advantage of our admissions guarantee." *Id.* Next, he recommended that the state legislature approve a 1.6 million dollar grant to fund PSAT examinations for all tenth graders. *Id.* Finally, he also proposed financial incentives to encourage teachers to provide advanced placement courses, and that teachers in low performing schools receive additional training. *Id.*

⁵⁹ See FLORIDA BOARD OF REGENTS, TALENTED 20 REPORT, available at http://www.borfl.org/borpubs/equity_education/talented_20_report.pdf (last visited Feb. 13, 2001). Students must also complete nineteen college preparatory credits in order to be eligible for the Talented 20 Program. *Id.* at 8. Under the Program, students are guaranteed admission to one institution within the Florida system, but may not necessarily be admitted to their "first choice institution since enrollment caps have been instituted at some universities." *Id.* at 2. The Talented 20 Program is one of three "pathways of access" for students into the state university system. The other two pathways utilize either traditional admissions criteria, such as grade point average combined with SAT or ACT performance, or a "profile assessment," which uses a wide variety of criteria to determine admission, including socio-economic status and geographic location. *Id.* at 21. As is the case in Texas and California, Florida's Talented 20 Program does nothing to attempt to enhance racial diversity within the state's graduate schools.

⁶⁰ *Announcement, supra* note 14.

⁶¹ *Id.* ("Even with the elimination of race and ethnicity as a factor in admissions, the Talented 20 program will result in a net increase in minority enrollment in the state university system.").

proposal was subject to intense opposition from its inception.⁶² Following a series of protests and a sit-in in the Lieutenant Governor's office, Governor Bush agreed to hold a series of three public hearings and delay the Board of Regents' consideration of the One Florida Initiative.⁶³ During those meetings, some voiced concerns that the only way the Talented 20 Program would succeed in achieving diversity at the university level would be if racial segregation in Florida high schools persisted.⁶⁴ Florida House Representative Chris Smith's statements were perhaps the most pointed: "[T]he reasoning for the Top 20 percent, is that there are black schools and white schools and if you take the top 20 percent, of course some of them are going to be black in the black schools."⁶⁵ Notwithstanding the concerns raised at the hearings, on February 16, 2000, Governor Bush announced that he planned to move forward with the One Florida Initiative, and the state Board of Regents quickly approved the program's implementation.⁶⁶ Further

⁶² See, e.g., Joe Humphrey, *Protest Delays Board Vote on One Florida Initiative*, ORACLE VIA U-WIRE, Jan. 20, 2000, LEXIS, Nexis Library, UNIVERSITY WIRE File; see also Jewel Gopwani, *Florida Students Stunned By Bush's Plan*, MICH. DAILY VIA U-WIRE, Nov. 15, 1999, LEXIS, Nexis Library, UNIVERSITY WIRE File; *United in Opposition*, ST. PETERSBURG TIMES, Nov. 19, 1999, at 20A (reporting that the One Florida Initiative was the subject of immediate opposition from those on both sides of the affirmative action debate).

⁶³ See Humphrey, *supra* note 62; Florida Legis., Joint Statement of Senator Meek and Representative Hill, at <http://www.freeflorida.net/joint.html>. State Board of Regents approval is required for any change to state university system admissions requirements. FLA. STAT. § 240.209 (1999).

⁶⁴ One student stated: "What happens when minority populations drop? No plan has been developed to ensure that the current under-represented populations remain the same and continue to increase." *One Florida Select Comm. Tallahassee Hearing (412 Knott Building)*, Fla. S. (Feb. 10, 2000), (statement of Elan Thompson, senior business administration major at Florida A&M University), available at <http://www.leg.state.fl.us/oneflorida> (last visited May 24, 2000).

⁶⁵ *One Florida Select Committee Miami Hearing*, Fla. S. (Feb. 3, 2000) (statement of Representative Chris Smith), available at <http://www.leg.state.fl.us/oneflorida> (last visited May 24, 2000). Representative Smith represents the Broward County District, and the majority of his constituents are either Black or Hispanic. Florida Legis., House District 93 Census, at <http://www.leg.state.fl.us/house/members/census/h93cen.html> (last visited May 24, 2000).

⁶⁶ Press release, Executive Office of the Governor of Florida, Governor Bush Moves Forward With One Florida Initiative (Feb. 16, 2000), available at http://www.state.fl.us/eog/press_releases/2000/feb/implement_2-16-00.html (on file with author). Governor Bush did make some improvements to the program after the hearings. These changes included the creation of the One Florida Accountability Commission which would review the extent of minority student enrollment for a three year period, a recommendation that thirty million dollars be spent to provide low performing high schools with computer equipment and Internet access, and a recommendation that funds be targeted for teacher training and support for higher-level courses in low-performing high schools. *Id.* The Talented 20 Program was also the subject of state-court litigation. On February 25, 2000, the NAACP, through its Florida conference of branches, and two individual plaintiffs filed a petition asserting that the Board of Regents and the state Board of Education did not have authority to implement the Talented 20 Program.

opposition to the One Florida Initiative surfaced on March 7, 2000, the opening day of the Florida legislative session, when at least 11,000 civil rights leaders demonstrated on Capitol Hill.⁶⁷ Despite the fervent protest against the One Florida Initiative, Governor Bush pushed forward and the plan was instituted for students entering college in the fall of 2000.⁶⁸ While it is too early to say exactly what effect the Talented 20 Program will have on minority admissions, "cascading," the movement of minority students from more prestigious to less selective colleges and universities, is a real possibility.⁶⁹ For instance, the University of Florida, the state's most prestigious educational institution, "expects a sharp decline in minority enrollment this fall."⁷⁰ But at the same time, many officials of Florida's public universities have hailed the Talented 20 Program and expect "minority enrollment likely will increase this fall at most of the 11 public universities."⁷¹

III. PERCENTAGE PLANS IN CONTEXT: HISTORICAL UNDERPINNINGS OF SEPARATE AND UNEQUAL EDUCATION

It is far beyond the scope of this article to explore in comprehensive detail the entire history of primary and secondary school segregation.⁷² Identifying the immediate, intermediate, and distant "causes" of school segregation is a complex and multi-balanced problem. First, there is no single, discrete phenomenon called "school segregation." Of course, one might observe that many public and private

William Yardley, *Legal Bump Laid for One Florida*, ST. PETERSBURG TIMES, Feb. 26, 2000, at 1B. Administrative Judge C.C. Adams found that the amendments to the admissions policy that would result in implementation of the Talented 20 Program were valid. See *NAACP v. Florida Bd. of Regents*, No. 00-0952RP (Fla. Div. of Admin. Hearings Mar. 8, 2000), available at <http://www.doah.state.fl.us/ro/2000/00%2D0952%2Edoc>.

⁶⁷ See Nancy Cook Lauer, *One Florida Edging Out Critics*, THE TALLAHASSEE DEMOCRAT ONLINE, May 7, 2000, at http://www.myflorida.com/myflorida/government/learn/one_florida_news_articles/one_fl_edging_out_critics.html.

⁶⁸ See Bragg, *supra* note 8, at A18; *Cool Rhetoric, Fine-Tune Plan*, SUN-SENTINEL, Mar. 9, 2000, at 22A (reporting that Governor Bush showed no signs of withdrawing his executive order notwithstanding public protests).

⁶⁹ See ROY L. BROOKS, GILBERT PAUL CARRASCO & MICHAEL SELMI, CIVIL RIGHTS LITIGATION: CASES AND MATERIALS 1219-20 (1995).

⁷⁰ Editorial, *Jury Still Out on Talented 20*, SUN-SENTINEL, Aug. 14, 2001, at A18.

⁷¹ Scott Powers, *Blacks Still Find Spot in College; Minority Enrollment is Up, and SATs May Play a Lesser Role at State Universities*, ORLANDO SENTINEL, Aug. 8, 2001, at A1; Bragg, *supra* note 8, at A18. (reporting that the "first freshman class selected to Florida's state college system since Gov. Jeb Bush put an end to race-based admissions has shown, instead of a decrease in minority enrollment, an increase of 12 percent").

⁷² Several excellent works in this area provide invaluable background information. See, e.g., RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (1975); J.W. PELTASON, FIFTY-EIGHT LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION (1961); MARK TUSHNET, MAKING CIVIL RIGHTS LAW (1994).

primary and secondary schools are racially segregated.⁷³ But it is impossible to meaningfully examine "school segregation" without appreciating its co-dependent variable: residential segregation. That is, school segregation and residential segregation are deeply interdependent; there is a "symbiotic relationship" between the two.⁷⁴ In part, racially segregated schools have been "caused" by our racially segregated neighborhoods, cities, and suburbs. In part, our racially segregated schools "cause" our neighborhoods, cities, and suburbs to be racially segregated. Second, just as there is a high level of interdependence between the twin social phenomena of school segregation and residential segregation, there is also high level of interdependence among the various actors who have, over time, contributed to that present reality. This level of interdependence makes it difficult to isolate discrete actors such as the state, the federal government, the zoning board, the real estate industry, or mortgage lenders and confidently attribute to each its fair share of culpability.⁷⁵

It is not my aim here to discern with exact specificity the role that Texas, Florida, and California have each played (and continue to play) in creating and maintaining a system of racial segregation in their respective school systems. However, this does not mean that the actions that states such as Texas, Florida, and California have taken in the past are irrelevant to my project. Instead, my view is that information about how the state operated in the past to create today's conditions will more fully inform the necessary discussion regarding the deeper concerns raised by percentage plans. Thus, my argument is not that because a particular state "caused" the segregated and inferior conditions that we observe today, it is therefore legally required to ameliorate them. My view as to how the past relates to the present in the context of my discussion of percentage plans is more nuanced. The nature of the state's obligation to ameliorate the effects of educational apartheid comes from establishing a system (percentage plans) which relies for its success on the underlying racial segregation and unequal educational opportunities below. From this perspective, an examination of the state's role in creating the current system then, which it reifies and continues with percentage plans, strengthens the argument (and hopefully the political resolve) that the state must move aggressively to dismantle all of the disabling effects of the current system.

⁷³ See generally Orfield & Yun *Study*, *supra* note 15.

⁷⁴ As John Powell has explained, the "link between housing and schools can also maintain segregation. For example, the return to neighborhood schools, for which many policy makers are now calling, may in fact maintain or increase the racial segregation of communities that are segregated and isolated by race and class." John Powell, *Living and Learning: Linking Housing and Education*, 80 MINN. L. REV. 749, 756 (1996).

⁷⁵ See *id.* at 763 ("It is difficult to join or even to identify all the possible governmental parties that have contributed to housing and school segregation.").

A. *The Past: From De Jure School Segregation to Formal Equal Opportunity*

Beginning after the Civil War in states such as Texas, Florida, and California, primary and secondary schools were required to be racially segregated by law.⁷⁶ It should not be forgotten that this was the period of formal legal inequality, which came after the long, dark night of slavery, the brief shining promise of Reconstruction, and the comeuppance of the Redemption.⁷⁷ During this period of *de jure* school segregation, the "education [Blacks] received was generally inferior in quality to that provided to southern whites."⁷⁸ This system of *de jure*, legally mandated racial segregation was not dislodged in many instances until well after the Supreme Court's 1954 *Brown v. Board of Education*⁷⁹ decision, which held that "[s]eparate educational facilities are inherently unequal."⁸⁰ As a

⁷⁶ For example, in 1885, Florida adopted a constitutional provision which read: "[w]hite and colored children shall not be taught in the same school, but impartial provision shall be made for both." SEGREGATION AND THE FOURTEENTH AMENDMENT IN THE UNITED STATES: A SURVEY OF STATE SEGREGATION LAWS 1865-1953 90 (Bernard D. Reams, Jr. & Paul E. Wilson eds., 1975). In Texas a similar situation obtained, and section 7 of Article VII of the Texas State Constitution of 1876 read: "[s]eparate schools shall be provided for the white and colored children, and impartial provision shall be made for both." *Id.* at 628. In California, segregation of the races, explicitly including segregation of White schoolchildren from children of "African or Mongolian" descent, was accomplished by a series of state statutes culminating in the codification of the Political Code of California of 1872, which provided that: "[t]he education of children of African descent and Indian children must be provided for in separate schools." *Id.* at 40; see also Richard Delgado & Jean Stefancic, *California's Racial History and Constitutional Rationales for Race-Conscious Decision Making in Higher Education*, 47 UCLA L. REV. 1521 (2000) (exploring the history of racial discrimination in California from a multi-cultural perspective). See generally John Hope Franklin, *Jim Crow Goes to School: The Genesis of Legal Segregation in Southern Schools*, in 7 RACE, LAW, AND AMERICAN HISTORY 1700-1990: THE STRUGGLE OF EQUAL EDUCATION PART I 408-11 (Paul Finkelman ed., 1959) (describing how the Southern states rushed to segregate public education by law after the end of Reconstruction).

⁷⁷ See generally JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS (8th ed. 2000).

⁷⁸ ROBERT A. MARGO, RACE AND SCHOOLING IN THE SOUTH, 1880-1950: AN ECONOMIC HISTORY 2 (1990).

⁷⁹ 347 U.S. 483 (1954).

⁸⁰ *Id.* at 495. Interestingly, however, California did experience a relatively lengthy reprieve from state mandated segregation. See Irving G. Hendrick, *Approaching Equality of Educational Opportunity in California: The Successful Struggle of Black Citizens, 1880-1920*, in 7 RACE, LAW, AND AMERICAN HISTORY 1700-1990: THE STRUGGLE OF EQUAL EDUCATION PART II 14 (Paul Finkelman ed., 1981) (describing how political agitation on the part of California's Black leadership lead to the repeal of the state's political code "which had mandated separate schools for black youth"). Unfortunately, that period of relative freedom and educational equal opportunity was only to obtain between 1880-1920. After the late 1910s, the "visible growth of the black population, coupled with court enforcement of segregated housing through restrictive covenants in real estate deeds . . . resulted in an acceleration of discriminatory actions of a

result, many generations of Black Americans attended primary and secondary schools that were both separate and unequal.⁸¹

In many ways *Brown* represented both an end and a beginning. It represented the end of formal inequality represented by *de jure* segregation, and the start of the regime of "formal equal opportunity."⁸² In the decades after *Brown*, amidst sometimes fierce opposition, countless lawsuits were brought against a variety of states and their political subdivisions in an attempt to make real *Brown*'s promise of equality; the ultimate goal was to desegregate hundreds of public school districts.⁸³ These suits, coupled with vigorous federal enforcement of the Civil Rights Act of 1964, were successful, and for a time many local school districts achieved some meaningful level of desegregation.⁸⁴ But the country's and the United States Supreme Court's enthusiasm for desegregation quickly waned. Once federal enforcement of desegregation slowed, local school districts were released from federal oversight, suburban school districts were absolved from any obligation to participate in the desegregation of central city school districts, and the irresistible trend back toward resegregation began.⁸⁵

B. *The Role of Residential Segregation*

An exclusive focus on the decades of state mandated racial separation in the schools, subsequent resistance to the *Brown* mandate, and an exploration of the numerous school desegregation lawsuits and the Supreme Court's evolving view of them, does not fully explain the segregated and inferior nature of our public primary and secondary schools today. It is not just that many states mandated racial segregation in the public schools, and that many states, state actors and localities resisted implementation of the *Brown* mandate. At the same time, many

public and private sort." *Id.* For an in-depth examination of the history of racial discrimination in California schools, see IRVING G. HENDRICK, *THE EDUCATION OF NON-WHITES IN CALIFORNIA, 1849-1970* (1977).

⁸¹ See FRANKLIN & MOSS, *supra* note 77, at 444-55.

⁸² See BROOKS, CARRASCO & SELMI, *supra* note 69, at 12.

⁸³ See generally MARK WHITMAN, *THE IRONY OF DESEGREGATION LAW 1955-1995* (1998).

⁸⁴ See Gary Orfield & Susan E. Eaton, *Turning Back to Segregation*, in *DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION* 8 (1996) ("By 1970, the schools in the South, which had been almost totally segregated in the early 1960s, were far more desegregated than those in any other region.").

⁸⁵ See *id.* at 22; Orfield & Yun *Study*, *supra* note 15, at 6. The authors noted that:

[A]fter the termination of court orders . . . the school districts would be declared 'unitary' and free of all taint of discrimination. Once that happened, school boards were free to make decisions that had the effect of creating unequal opportunities for minority students unless civil rights lawyers could prove that they had intended to discriminate, a standard that is virtually impossible to meet.

states and subdivisions thereof also engaged in a pattern of actions that: (1) helped to create the suburbs; (2) helped to ensure that the newly created suburbs were virtually all-White; and (3) contributed to residential segregation within our urban areas, now increasingly distinct from the suburbs. All of these actions in turn contributed to the racial segregation in our primary and secondary schools throughout metropolitan areas. Thus, a narrow focus only upon segregation in education itself leaves out another exceedingly important co-variable, that is, residential segregation. Schools and neighborhoods operate like two-way, interdependent ratchets, each acting on and transforming the other.

For example, most states and their subdivisions base school district attendance requirements on residential boundaries notwithstanding the fact that most "neighborhoods in the United States are segregated by class and race."⁸⁶ So in most instances, students attend a public school in the school district in which they reside.⁸⁷ Because where one lives tends to dictate where one's children will attend school, the types of school choices that are available to many consumer-parents are constrained.⁸⁸ This can have deleterious consequences. Indeed, this was explicitly recognized in the Supreme Court of Connecticut's landmark *Sheff v. O'Neill*⁸⁹ decision. In ruling that the state had violated a state constitutional mandate requiring a substantially equal educational opportunity for all public school children, the court made the following observation:

The state has nonetheless played a significant role in the present concentration of racial and ethnic minorities in the Hartford public school system. Although intended to improve the quality of education and not racially or ethnically motivated, the districting statute that the legislature enacted in 1909 . . . is the *single most important factor* contributing to the present concentration of racial and ethnic minorities in the Hartford public school system The districting

⁸⁶ See Molly McUsic, *The Law's Role in the Distribution of Education: The Promise and Pitfalls of School Finance Litigation*, in LAW AND SCHOOL REFORM: SIX STRATEGIES FOR PROMOTING EDUCATIONAL EQUITY 98 (Jay P. Heubert ed., 1999).

⁸⁷ McUsic describes public school residence requirements in the following manner:

In almost all states, school districts are required to educate all the students whose parents or guardians live within the geographic boundaries. Usually students are permitted to attend other public districts for the price of tuition. However, admissions decisions are left to the discretion of the district, which is legally obligated first to meet the needs of the students living within its borders. As a result, the number of students permitted to transfer is limited.

Id. at 97-98 (endnote omitted).

⁸⁸ Caroline M. Hoxby has explained how residence and access to schools are interrelated. Her view is that "[h]ouseholds choose among public school districts by choosing a residence. The degree to which households can exercise this form of choice depends heavily on the number, size, and residence patterns of the school districts in the area centered around their jobs." CAROLINE M. HOXBY, EVIDENCE ON SCHOOL CHOICE: WHAT WE LEARN FROM THE TRADITIONAL FORMS OF SCHOOL CHOICE IN THE UNITED STATES 3 (Kennedy Working Paper Series, Working Paper No. 97-09, 1997).

⁸⁹ 678 A.2d 1267 (1996).

statute is of critical importance because it establishes town boundaries as the dividing line between all school districts in the state.⁹⁰

Consequently, to the extent that our neighborhoods, cities, and suburbs and are racially segregated, so too, will be our schools.⁹¹

Conversely, segregated schools also enhance and reify residential segregation. This is the case because access to a particular type of public school drives consumer decisionmaking about neighborhood and subsequent homebuying decisions.⁹² That is, access to "quality" schools is consciously factored into neighborhood and homebuying decisions.⁹³ Educational quality is often associated with an all-White educational environment. Stated slightly differently, "families who benefit from sending their children to school with members of a historically privileged racial group [desire to] maximize this benefit."⁹⁴ Thus, to the extent that predominantly minority schools are perceived as inferior, parents with means will pay a premium to live in a neighborhood that does not include minority families so that their children can have access to higher "quality" schools. Under this version of the interdependent, two-way ratchet, "quality" drives decisionmaking, "race" does not.

Now if we step back and look at the twentieth century with an emphasis on residential segregation, we see that a variety of public and private factors have combined to cause the high levels of residential segregation that we observe today.⁹⁵ But without the actions of governments, including the states and their

⁹⁰ See *id.* at 1274. Indeed, empirical evidence suggests that the highest levels of residential segregation are present between specific school districts rather than within the school districts themselves. See CHARLES T. CLOTFELTER, PUBLIC SCHOOL SEGREGATION IN METROPOLITAN AREAS 20-21 (Nat'l Bureau of Econ. Research, Working Paper No. 6779, 1998).

⁹¹ See HOXB, *supra* note 88, at 4 ("[L]ow income or minority households are the most likely to be prevented from making reasonably optimal investments in their children's schooling, because their ability to choose residences in more than one district may be severely constrained by their budget or discrimination.").

⁹² The Supreme Court recognized this fact in *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 20-21 (1971) ("People gravitate toward school facilities, just as schools are located in response to the needs of people. The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner-city neighborhoods.").

⁹³ See powell, *supra* note 74, at 756.

⁹⁴ Carl Bankston III & Stephen J. Caldas, *Majority African American Schools and Social Injustice: The Influence of De Facto Segregation on Academic Achievement*, 75 SOC. FORCES 535, 539 (1996).

⁹⁵ These factors include: the actions of the federal government, see *infra* note 96; the actions of the states and their political subdivisions as are discussed herein; the actions of private organizations such as neighborhood "improvement" associations that "prevent[ed] . . . black entry and . . . maint[ained] . . . the color line"; the actions of realtors, banks, and other lending institutions; and finally, varied and sustained acts of violence and intimidation. See DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 35 (1993). Other outstanding works in

subdivisions, the ability for consumer-parents to exercise the "choices" described above and to expect that those choices would be protected over time simply would not be possible.⁹⁶ Thus, it is clear that the state and its subdivisions played

this field include: ROBERT WEAVER, *THE NEGRO GHETTO* (1948), an early and important examination of the causes of residential segregation with particular emphasis on the Great Migration and racial segregation through World War II, and KENNETH T. JACKSON, *THE CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* (1985), a seminal examination of suburbanization providing an extremely useful discussion of the federal government's role in creating our predominately White suburbs.

⁹⁶ The actions of the federal government in this regard deserve special consideration. Professor James Kushner has succinctly captured a few of the federal government's actions that have created segregated cities and suburbs:

The Federal Government acted as a joint adventurer in the movement toward suburban sprawl. The government guaranteed no-down-payment mortgages to veterans in order to facilitate access to the newly-developed housing. . . . Only a limited number of Blacks qualified for the veterans program as the policies of discrimination and segregation in the armed forces resulted in greater numbers of Whites being eligible for Veterans Administration (VA) benefits. Both the FHA and VA adopted policies which assured segregated subdivisions. These policies, based on fallacious assumptions about the real estate market, guaranteed that Blacks would remain in the central cities. In contrast, Whites commenced their dramatic exodus to the suburbs.

JAMES A. KUSHNER, *APARTHEID IN AMERICA: AN HISTORICAL AND LEGAL ANALYSIS OF CONTEMPORARY RACIAL RESIDENTIAL SEGREGATION IN THE UNITED STATES* 21-22 (1980) (citation omitted). Kushner continued with respect to our highway system and the provision of other federal grants:

Federal government encouragement of the development of all-white suburbs included various policies in addition to the provision of mortgage financing. . . . The Interstate Highway system, established by Congress, gave states generous grants to construct the expressways necessary to fuel the increased level of out-migration. In addition, federal grants for electric power, open space, water and sewage facilities were made available to discriminating suburban municipalities.

Id. at 22-23 (citations omitted). Kushner made the following assessment of a variety of federal housing programs:

Government housing programs have consistently augmented segregation in America. . . . The implementation of the[] early public housing programs resulted in the clearance of archaic integrated neighborhoods and the development of new public housing on a segregated basis. White projects were located in White neighborhoods while Black projects were located in the Black ghetto. . . . Th[is] pattern did not change in the 1960's. . . . The implementation of homeownership programs. . . resulted in Whites occupying new suburban tract homes while Blacks purchased existing homes in the central city. . . . The Federal Housing Authority (FHA) central city programs encouraged the sale of substandard homes, revitalized the housing market and facilitated White flight to the suburbs with the concomitant continuance of racial concentration.

Id. at 30-35 (citations omitted). Finally, Kushner made this comment with respect to federal community development programs:

Community development efforts became major factors in the segregation process. This

a major role in both segregating Blacks and Whites into distinct neighborhoods within cities themselves and creating a city/suburban divide with a significant racial component that in turn impacted the racial composition of our schools.⁹⁷

For example, early in the twentieth century, many cities passed racially restrictive land use controls and zoning ordinances "which restricted city blocks according to the occupant's race."⁹⁸ The cities' power to pass land use restrictions came directly from the state's police powers.⁹⁹ After the Supreme Court ruled, in *Buchanan v. Warley*,¹⁰⁰ that racially restrictive zoning was a violation of the due process clause of the Fourteenth Amendment, somewhat more covert means were used to accomplish the same ends: racially restrictive covenants.¹⁰¹ Racially restrictive covenants were agreements that "ran with the land" and which often covered large areas, binding future buyers and prohibiting them from subsequently selling the property to Blacks or other undesirable racial groups.¹⁰² While restrictive covenants are private contracts, they are effective only as a result of an enforcement mechanism to punish transgressors which was supplied by the state judiciary.¹⁰³ Judicial enforcement of these private schemes of racial segregation leant the state's prestige and imprimatur to racial bigotry and discrimination.¹⁰⁴ It was not until 1948 that the Supreme Court struck down judicial enforcement of such covenants as a violation of the Fourteenth Amendment. However, such covenants "continued to be used informally to organize resistance to black entry."¹⁰⁵

Other state policies contributed to current patterns of residential segregation. For instance, as the suburbs grew, spurred on by a variety of governmental incentives, they employed their legal authority to do so without Blacks.¹⁰⁶ The

national policy resulted in the uprooting of large communities of predominately Black, poor, urban residents, followed by the sacrifice of their neighborhoods to freeways or urban renewal. . . . Consistently, the relocatees were thrust into other racially concentrated, substandard housing markets characterized by overcrowding and high rents. Both urban renewal and racial covenants affected Black housing markets almost identically, except urban renewal reclaimed land for the segregated, White neighborhood.

Id. at 37–39 (citations omitted). See generally MASSEY & DENTON, *supra* note 95; Kevin Fox Gotham, *Blind Faith in the Free Market: Urban Poverty, Residential Segregation, and Federal Housing Retrenchment, 1970–1995*, 68 SOC. INQUIRY 1 (1998).

⁹⁷ See generally KUSHNER, *supra* note 96, at 44–63.

⁹⁸ KUSHNER, *supra* note 96, at 16 (citation omitted).

⁹⁹ See *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926).

¹⁰⁰ 245 U.S. 60, 82 (1917).

¹⁰¹ Many cities continued to engage in racially restrictive zoning long after the Supreme Court found such ordinances unconstitutional. See KUSHNER, *supra* note 96, at 16 n.36 (noting that the "Palm Beach, Florida Ordinance was still on the books as late as 1958").

¹⁰² See KUSHNER, *supra* note 96, at 16–17 (citations omitted).

¹⁰³ See *Shelley v. Kraemer*, 334 U.S. 1, 4–6 (1948).

¹⁰⁴ See *id.* at 20.

¹⁰⁵ See *id.* at 23; MASSEY & DENTON, *supra* note 95, at 188.

¹⁰⁶ KUSHNER, *supra* note 96, at 44–50.

suburbs used their power to regulate land uses in a manner that, while not explicitly regulating use or occupancy on the basis of race, often had the very same effect. As utilized in suburban areas, "euclidean"¹⁰⁷ zoning, which restricted land development to enhance taxes and property values by restricting population densities, was an extremely effective means of creating and maintaining predominantly White neighborhoods.¹⁰⁸ At the same time, states regulated and licensed private actors, such as real estate brokers and mortgage lenders who plied their craft through racially discriminatory practices such as "racial steering,"¹⁰⁹ "blockbusting,"¹¹⁰ and "redlining."¹¹¹ State tax policies enhanced the power of the suburbs at the expense of cities generally, and more specifically, created a tax system guaranteeing superior financing of suburban schools.¹¹²

These actions on the part of states and their subdivisions played a central role in creating a separate housing market for Blacks and Whites that, along with historic racial segregation in the schools and the inability to fulfil the *Brown v. Board of Education* mandate, have led to substantial racial segregation in our schools which we observe today. Thus, as we look back at the twentieth century,

¹⁰⁷ See *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (upholding municipal land use restrictions as a valid exercise of the state's police powers).

¹⁰⁸ See KUSHNER, *supra* note 96, at 44–52 ("[S]uburbs engaged in aggressive land use control practices, designed to maintain their communities as all-white, middle class havens.").

¹⁰⁹ See MASSEY & DENTON, *supra* note 95, at 99–100 (defining "racial steering" as realtors often clandestine refusal to show minorities homes or rental properties in White neighborhoods).

¹¹⁰ See *id.* at 37–38 (defining "blockbusting" as a churning process whereby realtors would select promising transitional areas in White neighborhoods, sell to a few Black families and then intentionally "increase white fears and spur black demand" for housing in the area using a variety of techniques. As "whites gave up defending the neighborhood, black demand soared and agents reaped substantial profits, because the new entrants were willing to pay prices much higher than those previously paid by whites.").

¹¹¹ "Redlining" is the practice of refusing to provide mortgages and other types of financial services to homeowners living in defined areas, usually minority neighborhoods and communities. See *id.* at 51–52. See generally *Nat'l Bank v. Commonwealth*, 76 U.S. 353, 362 (1869) (finding that "[banks] are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the nation").

¹¹² As James Kushner has explained:

The real property tax is the primary source of funding for schools and municipal services. *Ad valorem* property taxes, based on the assessed valuation of land plus improvements, have been a major catalyst fostering urban decay. Tax-ratable commercial and industrial land uses contribute a large amount of revenue in proportion to their low demand for services; while their suburban relocation has left the residents of the deteriorating housing market without the means to pay for their expensive welfare and educational services. The central city government is placed in an untenable position as assessed property valuations decline in inverse proportion to escalating demand for services. This results in a continually increasing tax burden on the remaining residents to sustain their welfare, educational requirements and community services.

KUSHNER, *supra* note 96, at 59–60; see also McUsic, *supra* note 86, at 97–99.

only a relatively brief pause punctuated the seemingly inexorable pull toward racially segregated and unequal schools. The period of pause, from roughly the mid 1960s to the late 1980s, was perhaps the only time during the century that Black Americans experienced any sustained period of real improvement in the staggering levels of racial segregation in primary and secondary schools.¹¹³ This period coincided with vigorous federal commitment to civil rights objectives,¹¹⁴ including vigorous executive enforcement of federal civil rights laws that prohibited racial segregation in public schools and promoted desegregation and a tendency on the part of the federal judiciary to side with minority plaintiffs in school desegregation cases.¹¹⁵ During this period, federal judicial oversight (others would say "control") of schools districts was common. As the control of many public school districts has returned to localities and desegregation orders have been terminated, racial segregation in many public school districts has increased.¹¹⁶

C. The Present: Percentage Plans in Context

Given this background of governmental action furthering a system of segregation, it may seem curious that percentage plans have been advanced in Texas, California, and Florida. Several factors have come together to produce this phenomenon. First, there is a political and social desire for some level of racial diversity in public higher education. Second, race-conscious affirmative action cannot be used in college admissions in each state, albeit for disparate reasons. Third, Blacks and Latinos do not score as well on the SAT (a traditional indicator of college preparedness) and other standardized tests as do Whites and Asians.¹¹⁷ Thus, if the SAT were relied upon to determine admission to state colleges and universities, those institutions will not be as racially diverse as they once were.¹¹⁸ Fourth, high school grade point average is also a traditional indicator of college preparedness, and a high GPA, whatever the school, tends to evidence effort and academic achievement relative to a student's peer group at the same high school. Fifth, many high schools are heavily racially segregated because most metropolitan areas are racially segregated. So an admissions plan that selects students based on their grade point average will tend to yield a more racially diverse pool than an admission plan that relies on the SAT. Sixth, such a plan is

¹¹³ See generally Orfield & Eaton, *supra* note 84, at 1-22.

¹¹⁴ See *id.*

¹¹⁵ See *id.*

¹¹⁶ See generally *id.* at 1-22, 53-71.

¹¹⁷ See Nettles, *supra* note 7, at 105 ("[T]he average performance of African Americans and Hispanics on standardized tests is substantially lower than that of whites and Asians."); see also NATIONAL COUNCIL OF LA RAZA, LATINO EDUCATION: STATUS AND PROSPECTS, STATE OF HISPANIC AMERICA 1998 72 (1998) (reporting that by "1997, the [average total SAT] scores for Whites, Blacks, and Hispanics increased to 1052, 857, and 934, respectively").

¹¹⁸ See *id.* See generally *infra* notes 128, 149.

also facially race-neutral, thus diminishing many of the constitutional problems associated with racial classifications.¹¹⁹ Finally, Blacks (and to a lesser extent Latinos), experience high levels of residential racial segregation, both within the cities and the suburbs.¹²⁰ Since residence tends to dictate school attendance, our public schools are also largely racially segregated in both urban and suburban areas, and the level of racial segregation in public schools is increasing rather than decreasing.¹²¹ Most importantly, racially segregated schools are inherently

¹¹⁹ See *infra* Part III.

¹²⁰ Blacks experience a higher degree of residential racial segregation than any other racial group in the United States. Professor Nancy Denton has described Black Americans as "hypersegregated," that is, they are "unevenly distributed across neighborhoods; they are highly isolated within very racially homogenous neighborhoods and their neighborhoods are clustered to form contiguous ghettos, centralized near central business districts and away from suburban schools and jobs, and concentrated in terms of population density and spatial area compared to white neighborhoods." Nancy Denton, *The Persistence of Segregation: Links Between Residential Segregation and School Segregation*, 80 MINN L. REV. 795, 798 (1996); see also Diana Jean Schemo, *Persistent Racial Segregation Mars Suburbs' Green Dream*, N.Y. TIMES, March 17, 1994, at A1 (examining residential segregation in suburban areas and reporting that "lily-white communities tend not to become integrated but to remain largely lily-white, with the addition of well-defined minority precincts").

The situation with respect to Latinos is somewhat more complicated. "Hispanics" as a group experience moderate levels of residential racial segregation. See Denton, *supra*, at 800. However, within that group, Black racial status is a key variable. Professor Denton has observed, with respect to Hispanics and residential segregation, that intergroup variations are significant. Thus, among "Hispanics, those who identify racially as black or as 'Spanish race' are more segregated than those who identify as white. Cities with a Hispanic population that is largely or historically Puerto Rican have higher Hispanic versus non-Hispanic white segregation scores than those dominated by Mexicans or Cubans." *Id.* (citations omitted); see also Emily Rosenbaum, *The Influence of Race on Hispanic Housing Choices: New York City, 1978-1987*, 32 URB. AFF. REV. 217, 234 (1996) (her results "provide evidence of the processes of social and market forces that isolate not only Anglos from African-Americans and Hispanics but also, increasingly, African-Americans and black Hispanics from all persons of nonblack status"). See generally Anna M. Santiago, *Trends in Black and Latino Segregation in the Post-Fair Housing Era: Implications for Housing Policy*, 9 LA RAZA L.J. 131, 131 (1996) (finding that "Latino segregation from Anglos has increased in a number of metropolitan areas during the past 20 years").

¹²¹ For example, Orfield and Yun found four trends that currently dominate our social landscape. First, schools in the American South are resegregating. Second, Latino students are increasingly segregated. Third, although there is an increasingly large number of Black and Latino students attending suburban public schools, the suburbs are residentially segregated, which does not bode well for desegregated education in those areas. Finally, while "all racial groups except whites experience considerable diversity in their schools . . . whites are remaining in overwhelmingly white schools even in regions with very large non-white enrollments." See Orfield & Yun *Study*, *supra* note 15, at 3; see also Russell W. Rumberger & Douglas J. Wilms, *Achievement Gap in California High Schools*, 14 EDUC. EVALUATION & POL'Y ANALYSIS, 377, 392 (1992) (examining racial segregation in California high schools and finding that "segregation was large in the state as a whole and within each of the six largest school districts").

inferior *because* they are racially segregated.¹²²

Residential segregation concentrates not just race, but also poverty, which in turn is associated with a variety of extraordinarily detrimental effects on the inhabitants of minority neighborhoods, including lowering educational attainment at the schools that minority group members attend.¹²³ As Professors Massey and Denton have so powerfully maintained, "the organization of public schools around geographical catchment areas . . . reinforces and exacerbates the social isolation that segregation creates in neighborhoods. By concentrating low-achieving students in certain schools, segregation creates a social context within which poor performance is standard and low expectations predominate."¹²⁴ The sad and continuing reality is that, as a general matter, schools that are racially segregated—by this I mean minority concentrated schools—are inferior to predominantly White schools across a wide variety of indicia, including lower educational achievement.¹²⁵ Thus, schools with high minority concentrations experience an overall lack of material resources, lower standards for certification and compensation of teachers, higher drop-out rates, lower rates of college attendance, a dearth of advanced placement classes and up-to-date facilities, lower parental involvement, and educationally adverse peer group behaviors.¹²⁶ Residential segregation thus amplifies school segregation and concentrates poverty, both of which in turn create, foster, and maintain "concentrated

¹²² See *Sheff v. O'Neill*, 678 A.2d 1267, 1281 (1996) (interpreting the Connecticut state constitution to find that "the existence of extreme racial and ethnic isolation in the public school system deprives schoolchildren of a substantially equal educational opportunity"). See generally *powell*, *supra* note 20.

¹²³ See MASSEY & DENTON, *supra* note 95, at 141 ("[B]ecause poverty is associated with poor educational performance[,] segregation also concentrates educational disadvantage."); see also Orfield & Yun *Study*, *supra* note 15; Douglas S. Massey et al., *Migration, Segregation, and the Geographic Concentration of Poverty*, 59 AMER. SOCIO. REV. 425, 442 (1994) ("[G]eographically concentrated poverty ultimately stems from racially segregated U.S. housing markets.").

¹²⁴ See MASSEY & DENTON, *supra* note 95, at 141; see also Rumberger & Wilms, *supra* note 121, at 392 ("Given that White students, on average, come from more advantaged backgrounds and have higher levels of achievement, the proportion of White students in a school may be critical to determining the climate of a school and its levels of teaching and nonteaching resources.").

¹²⁵ Carl L. Bankston & Stephen J. Caldas, *The American School Dilemma: Race and Scholastic Performance*, 38 SOC. Q. 423, 428 (1997) ("[R]esidence is the basis of school assignment This means that residential social isolation, rather than social isolation in schools, may account for the comparatively weak performance of students in minority concentration schools."). See generally Bankston & Caldas, *supra* note 94.

¹²⁶ See *powell*, *supra* note 20, at 385–91. See generally Applied Research Center, *Facing the Consequences: An Examination of Racial Discrimination in U.S. Public Schools* (2000), at www.arc.org/erase/FTC1intro.html (finding that on "every key indicator, from drop-out rates and discipline rates to access to advanced placement courses and entrance to college, students of color are at a serious disadvantage to their white counterparts").

disadvantage” and educational inequality for minority students.¹²⁷ It was against this complex and mutually reinforcing reality, extant across our nation, that Texas, California, and Florida created percentage plans ostensibly to reward hard work and academic achievement in high school and to ensure some level of racial diversity in public higher education.

IV. LEGAL ASPECTS OF PERCENTAGE PLANS: POTENTIAL CONSTITUTIONAL CHALLENGES

Under current Supreme Court precedents, plaintiffs have been successful in striking down race-conscious preferential affirmative action plans. The state of affirmative action jurisprudence raises an interesting question when applied to percentage plans: might a percentage plan survive a constitutional challenge in this climate? Let us examine perhaps the most obvious challenge that might be made against a percentage plan; one that might come from a White student hailing from an academically strong and predominantly White suburban high school in a state where a percentage plan admissions system for state colleges and universities operates. In this high school, classes are challenging, many advanced placement courses are offered, and the students are well prepared and compete intensely for grades. The vast majority of the students attending this high school come from families whose income equals or exceeds the area median. In this high school, our hypothetical plaintiff has earned superior but not outstanding grades, and her grade point average places her just outside of the top four, ten, 12.5, or twenty percent of her class. Let us also make our hypothetical plaintiff an excellent test taker. Let us assume that she scores in the top two percent of all test takers statewide on the SAT.

Now let us now shift our vision away from the academically strong suburban high school to its companion twenty-five miles away located in an urban area, but within the same metropolitan region as the suburban high school discussed above. In this high school, the students are predominantly Black and Hispanic. The vast majority of the students attending this high school come from families whose income is below the area median. In this high school, classes are far from challenging, few advanced placement courses are offered, and many students lack adequate preparation to do demanding high school work because of a weak “feeder” middle school. Let us assume further that few of the students graduating in the top four, ten, 12.5, or twenty percent of this high school class were also in the top two percent of all test takers statewide on the SAT.¹²⁸

¹²⁷ See Lauren J. Krivo et al., *Race, Segregation and the Concentration of Disadvantage: 1980–1990*, 45 SOC. PROBS. 61, 61, 76 (1998) (“[H]igher levels of racial residential segregation are associated with greater concentration of *Black* disadvantage but generally have a negligible or opposite effect for Whites. That is, in some cases greater segregation actually benefits Whites by geographically buffering them from much higher levels of Black disadvantage.”).

¹²⁸ It is clear that there is a “test score gap” between Blacks and Hispanics, on the one

Styled along classic "reverse discrimination" lines, our challenger might argue that "less qualified" Black and Hispanic students are being admitted to the state university system while she, a White student, is not. Under this argument, percentage plans provide Blacks and Hispanics with a preference for admission to or eligibility for state colleges and universities that is denied to Whites. This view is premised on the theory that our White student, who ranked near but not in the top of her more competitive suburban class, would have ranked in the top of her class in a less competitive, urban high school. Moreover, our challenger might assert that under the previous admissions system (only very recently jettisoned), which weighed performance on a standardized entrance examination, such as the SAT, heavily in the admissions determination, she would likely have been admitted to the state school. Under the current system, her admissions prospects are dimmed and those of Blacks and Hispanics are favored at her expense.

A. Potential Equal Protection Challenges

How would the current Supreme Court's Equal Protection doctrine be applied in such a challenge? Our plaintiff would likely begin by arguing percentage plans are animated by a discriminatory purpose and are therefore a

hand, and Whites and Asian Americans on the other. *See supra* notes 7, 117. What is less clear is the cause or causes of that gap. Debate with respect to this issue has at times been furious. The 1994 publication of Richard J. Herrnstein and Charles Murray's book, *The Bell Curve: Intelligence and Class Structure in American Life*, which argued that Blacks' and Whites' disparate performance on IQ (and SAT) tests could be explained at least in part by reference to "genetic differences" between the two groups, ignited a firestorm of controversy. RICHARD J. HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* (1994). In response, many commentators argued persuasively that the causes of the test score gap could be more readily understood as a function of social and economic inequality rather than as a result of some objectively measurable (and heritable) notion of "intelligence." *See, e.g.,* *THE BELL CURVE WARS: RACE, INTELLIGENCE, AND THE FUTURE OF AMERICA* (Steven Fraser ed., 1994); CHARLES S. FISCHER ET AL., *INEQUALITY BY DESIGN: CRACKING THE BELL CURVE MYTH* (1996); *INTELLIGENCE, GENES, AND SUCCESS: SCIENTISTS RESPOND TO THE BELL CURVE* (Bernie Devlin et al. eds., 1997). For the purposes of my project, I will assume that there are a variety of causes of the test score gap, at least one of which is the racially segregated and inferior educations that many Blacks and Hispanics receive. *See generally* *THE BLACK-WHITE TEST SCORE GAP* (Christopher Jencks & Meredith Phillips eds., 1998). From this perspective, I am less concerned with performing an in-depth analysis of each of the causes of diminished SAT performance than pointing to what such performance represents. My view is that lower Black and Hispanic performance on tests, such as on the SAT, reflect the racially segregated and consequently inferior nature of the education that such students often receive. *See generally* Caldas & Bankston, *supra* note 94. That is to say that racially segregated public schools are inferior because they concentrate poverty and associated ills and that many students attending such schools suffer diminished educational achievement as a result. Given that, my view is simply that the state has an obligation to attempt to desegregate and improve the education that those students receive.

violation of the Equal Protection Clause of the Fourteenth Amendment.¹²⁹ From our plaintiff's perspective, percentage plans' discriminatory purpose is the desire to advantage Blacks and Hispanics at the expense of Whites and Asians. This view argues that the state has replaced a race-conscious, preferential affirmative action plan with a race-neutral yet still preferential affirmative action plan—the same discriminatory purpose animates them both. At bottom, the plaintiff would argue, the purpose of the prior race-conscious affirmative action plan was to admit less qualified minority group members, and the purpose of the current race-neutral affirmative action plan is to admit less qualified minority group members. The new plan simply uses a race-neutral means to achieve the same ends—ends that are presumptively unconstitutional under *Richmond v. Croson*¹³⁰ and *Adarand v. Peña*.¹³¹

Moreover, our plaintiff would further support her claim by suggesting that the state cannot escape heightened judicial review simply by disguising its discriminatory purpose through race-neutral means.¹³² It is true that the Court has expressed a disinclination to examine the motives of state actors.¹³³ But the Court has been willing to pierce the veil of facial neutrality and find covert discriminatory purpose where the "conclusion would be irresistible, tantamount for all practical purposes to a mathematical demonstration,"¹³⁴ that the action is solely concerned with discrimination on the basis of race.

Along these lines, our plaintiff's view is that percentage plans reflect invidious, race-based discrimination for at least two, interrelated reasons. First, there is little question that percentage plans, as a method for determining admission to state colleges and universities, would not have been adopted had the previous system of race-conscious preferential affirmative action been sustainable.¹³⁵ It is only in the absence of race-conscious, preferential affirmative action that "the next best thing"—percentage plans—become attractive.¹³⁶ And

¹²⁹ See *Washington v. Davis*, 426 U.S. 229, 236 (1976).

¹³⁰ 488 U.S. 469 (1989).

¹³¹ 515 U.S. 200 (1995).

¹³² See *Washington v. Davis*, 426 U.S. at 241 ("[T]his is not to say that the necessary discriminatory racial purpose must be express or appear on the face of the statute . . ."); see also *Griffin v. County Sch. Bd. of Prince Edward County*, 377 U.S. 218 (1964).

¹³³ See *Palmer v. Thompson*, 403 U.S. 217, 225 (1971) ("It is difficult or impossible for any court to determine the 'sole' or 'dominant' motivation behind the choices of a group of legislators."); see also *Rogers v. Lodge*, 458 U.S. 613, 641 n.23 (Stevens, J., dissenting) (arguing that the majority's subjective analysis into the motivation behind the Burke County, Georgia at-large electoral system for electing members of its governing Board of Commissioners was misplaced).

¹³⁴ *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960).

¹³⁵ See Samuel Issacharoff, *Can Affirmative Action Be Defended?*, 59 OHIO ST. L.J. 669, 687 (1998) [hereinafter Issacharoff] (explaining that the end of affirmative action in Texas forced the Texas legislature to "reduce admissions standards" including using methods such as percentage plans).

¹³⁶ On this view, percentage plans function as a substitute or proxy for a prior race-

what exactly is the state trying to do in implementing these plans? Our plaintiff's response is that the state is intentionally attempting to diminish the number of White students in state colleges and universities by enhancing Black and Hispanic representation.¹³⁷ From this perspective, the state action is taken "because of" rather than "in spite of" its adverse effect on White citizens—embodying a state ordained preference for Blacks and Hispanics over Whites.¹³⁸ Second, from our plaintiff's perspective, the timing is evidence of motive. In states in which they have been adopted, percentage plans come close on the heels of a rejection or prohibition of race-conscious affirmative action. Our plaintiff would argue that such a quick transition is indicative of the fact that the same discriminatory purpose animates both the recently discarded race-conscious, preferential affirmative action regime and the newly discovered race-neutral affirmative action program.¹³⁹

Finally, our plaintiff would also argue that percentage plans have a discriminatory effect because a higher percentage of "less well qualified" Blacks and Hispanics would be admitted through their operation instead of "better qualified" White students (of which she is one). Thus, percentage plans would have a discriminatory impact, functioning to admit more minority students with *lesser qualifications* than White students with more impressive credentials. Plaintiff's argument here is epitomized by the remarks made by one critic of Florida's Talented 20 Program who stated that "the real argument . . . is whether minorities are entitled to positions in the state university system when there is a nonminority applicant with better academic and other relevant credentials."¹⁴⁰ While this argument would concede that evidence of disparate impact alone is insufficient to state a violation of the Equal Protection Clause,¹⁴¹ it would augment the assertion that percentage plans are animated by discriminatory

conscious preferential affirmative action program for determining admission to a state college or university that is currently "off the table" either because of a judicial decree, constitutional amendment, or an executive order. For example, Florida was very open about the fact that the Talented 20 Program was a "means of furthering diversity" that replaced the explicit use of race and ethnicity as a factor in admissions determinations. See Office of the Governor of Florida, One Florida Summary—What does the One Florida Education Plan Actually Do?, at http://www.myFlorida.com/myflorida/government/learn/one_florida/FloridaSummary.html (last visited Aug. 10, 2000). In fact, in one remark Governor Bush noted: "I hope that you'll get a sense that what we're here to propose transcends the tired debate about affirmative action . . . [T]he new initiative that we are unveiling today I believe will increase diversity in the universities . . . without using policies that discriminate or pit one racial group against another." *The Newshour with Jim Lehrer: One Florida* (PBS television broadcast, June 2, 2000) at http://www.pbs.org/newshour/bb/education/jan-june00/florida_6-2.html.

¹³⁷ See *supra* note 8.

¹³⁸ See *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

¹³⁹ See, e.g., *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000).

¹⁴⁰ See Bragg, *supra* note 8 (reporting the statements of Sam J. Yarger, Dean of the School of Education at the University of Miami).

¹⁴¹ See *Washington v. Davis*, 426 U.S. 229, 242 (1976).

purpose. Thus, evidence of discriminatory effect would help shift "the burden of proof . . . to the State to rebut the presumption of unconstitutional action."¹⁴²

B. Responses to Equal Protection Arguments

What are we to make of our plaintiff's arguments? In a recent article, Kathleen Sullivan suggested a variety of rationales for why a "reverse discrimination" challenge to a "race-neutral affirmative action"¹⁴³ plan such as a percentage plan would be likely to fail.¹⁴⁴ First, she suggested that because the government's goal in utilizing percentage plans is to enhance diversity, such action is taken "despite, rather than because of, the effect on white interests," therefore there is no discriminatory purpose.¹⁴⁵ Second, Sullivan pointed out that individual Whites will have a "difficult time showing that they lost any discrete opportunity to a member of a racial minority group, the type of claim made by Alan Bakke," that is, that such claims would be too generalized to survive review.¹⁴⁶ Finally, she noted that the Constitution does not require any particular type of admissions system, that is, that the state is free to alter its admissions system to serve the goals of "geographic representation or class mobility."¹⁴⁷ On this view, there is no entitlement to a particular admissions system so that a "group['s] share" of seats could not be reduced.¹⁴⁸

Sullivan is undoubtedly persuasive with respect to her second and third assertions. There is no question that a reverse discrimination percentage plan challenge would be significantly more difficult to mount from an evidentiary perspective than a garden variety "*Bakke*-type" challenge where the litigation "universe" is defined by the defendant's applicant pool, its admits, and its rejects in a given admissions cycle. The difficulties are seemingly endless. For instance, how is a determination to be made with respect to the appropriate qualifications necessary for admission and success at a state college or university, that is to say, how do we define "merit" for these purposes? Another difficulty that our plaintiff would face is establishing the appropriate comparison group. Does one identify an appropriate predominantly minority high school and compare it academically to the plaintiff's high school, or should the plaintiff examine the records of a variety of Black and Hispanic students admitted under a percentage plan, and

¹⁴² See *id.* at 241 (citing *Alexander v. Louisiana*, 405 U.S. 625, 632 (1972)).

¹⁴³ See Kim Forde-Mazrui, *The Constitutional Implications of Race-Neutral Affirmative Action*, 88 GEO. L.J. 2331, 2334-35 (2000); see also *id.* at 2333 (describing the Texas Ten Percent plan as an "ostensibly race-neutral effort[] to increase minority representation in higher education," that is, as a "race-neutral affirmative action" program).

¹⁴⁴ Kathleen Sullivan, *After Affirmative Action*, 59 OHIO ST. L.J. 1039 (1998).

¹⁴⁵ See *id.* at 1050 (citation omitted).

¹⁴⁶ See *id.* at 1052 (noting that "[a]mong alternative admission policies that are race-neutral in form, no one in particular is constitutionally compelled over any other.").

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

compare them to the plaintiff's record? How exactly are high school records to be compared such that the plaintiff can assert that the minority students are less "well qualified" or "deserving" of admission to the state school than the plaintiff? How would plaintiff begin to describe the appropriate baseline or academic requirements that the state should adopt for admission to its colleges and universities?

Perhaps our plaintiff would point to differences in performance on the SAT between Black and Hispanic versus White and Asian test takers, which she would argue, provide an objective, easily identifiable standard of "merit": Blacks and Hispanics with lower test scores "got in," she had a higher test score but did not. Such an argument assumes as a normative matter the propriety of the use of the SAT in the admissions determination, that is, that there is a correlation between high SAT scores and who *should be* admitted to college. This view holds that the SAT is a good proxy for "merit" because it accurately measures scholastic aptitude and can accurately predict scholastic success, and thus should be used in the admissions process notwithstanding any adverse impact on minority group members. The problem, of course, is that these assumptions are heavily contested.¹⁴⁹

Leaving aside for a moment the debate about whether such test scores should determine access to college in the first instance, "limitations notwithstanding, achievement test performance remains an important measure of student ability and school performance."¹⁵⁰ My view is that Blacks' and Latinos' performance on standardized tests is reflective of the fact that the education they receive is very often racially segregated and therefore of inferior quality.¹⁵¹ The nature and

¹⁴⁹ See, e.g., Claude Steele, *Expert Testimony in Defense of Affirmative Action*, in *SEX, RACE, & MERIT: DEBATING AFFIRMATIVE ACTION IN EDUCATION AND EMPLOYMENT* 124 (Faye J. Crosby & Cheryl VanDeVeer eds., 2000). The author argues that:

[S]tandardized admissions tests such as the SAT, the ACT, and the LSAT are of limited value in evaluating 'merit' or determining admissions qualifications of all students, but particularly for African American, Hispanic, and American Indian applicants for whom systematic influences make these tests even less diagnostic of their scholastic potential.

Id.; see also WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* (1998); Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953 (1996).

¹⁵⁰ A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY 346 (Gerald David Jaynes & Robin M. Williams, Jr. eds., 1989); *supra* notes 128, 149 and accompanying text.

¹⁵¹ Professor Gary Orfield has argued that racially segregated schools depress student achievement because racial segregation concentrates poverty:

Though we usually think of segregation in racial and ethnic terms, it's important to also realize that the spreading segregation has a strong class component. When African-American and Latino students are segregated into schools where the majority of students are non-white, they are very likely to find themselves in schools where poverty is concentrated. This is of course not the case with segregated white students, whose

quality of the education that many Blacks and Latinos receive, which is often racially segregated and unequal, systematically disadvantages them across a variety of indicators, including their performance on standardized tests.¹⁵² An equally persuasive argument is that the use of test scores in the admissions process protects the prevailing status quo, rewards inherited privilege and thus does “violence to fundamental principles of equity and ‘functional merit’ in its distribution of opportunities for admission to higher education.”¹⁵³ Consequently, it is just as easy to see our hypothetical plaintiff’s position as an argument that seeks to “protect the turf” of the privileges that members of her particular group had enjoyed under the previous admissions system, as one grounded in objective and unassailable notions of merit.

With respect to Dean Sullivan’s first argument, however, we must pause. Her assertion with respect to discriminatory purpose in the context of facially race-neutral governmental action under the Equal Protection Clause is at least open to question. Even if one rejects the notion that percentage plans were implemented intentionally to decrease the number of Whites attending state colleges and universities, one could well argue that governmental action intentionally taken to advance the interests of one group is necessarily also taken, at least in part, to retard the interests of another.¹⁵⁴ Leaving aside for a moment questions with

majority-white schools almost always enroll high proportions of students from the middle class. This is a crucial difference, because concentrated poverty is linked to lower educational achievement. School level poverty is related to many variables that effect a school’s overall chance to successfully educating students, including parent education levels, availability of advanced courses, teachers with credentials in the subject they are teaching, instability of enrollment, dropouts, untreated health problems, lower college-going rates and many other important factors.

Orfield & Yun *Study*, *supra* note 15, at 3.

¹⁵² For instance, Bankston and Caldas found that “black students in white schools do better than black students in racially mixed or in predominantly black schools” and suggest that “residential social isolation” may be an explanation for that finding. Bankston & Caldas, *supra* note 125, at 428. Moreover, Professor Gary Orfield has argued that the relative low levels of Asian residential segregation may explain the academic performance of many Asian American students. See GARY ORFIELD, ASIAN STUDENTS AND MULTIETHNIC DESEGREGATION 2 (The Harvard Project on School Desegregation, 1994); THE STATE OF ASIAN PACIFIC AMERICA: TRANSFORMING RACE RELATIONS, LEAP ASIAN PACIFIC AMERICAN PUBLIC POLICY INSTITUTE 5 (Paul M. Ong ed., 2000) (noting that, in contrast to Blacks and Hispanics, Asian Americans “are the least residentially segregated minority group”). Professor Orfield’s view is that “in general, Asians are far less likely than African Americans and Latinos to confront segregation either by race or [sic] poverty. Since racial and economic segregation are very strongly related to lower levels of school academic achievement, this means that most Asian students attend more competitive schools.” GARY ORFIELD, ASIAN STUDENTS AND MULTIETHNIC DESEGREGATION 2 (1994).

¹⁵³ See Sturm & Guinier, *supra* note 149, at 957 (citation omitted).

¹⁵⁴ See, e.g., Forde-Mazrui, *supra* note 143, at 2348 (“[R]ead in conjunction with *Feeney*, *Crosen* and *Adarand* establish that a ‘discriminatory purpose’ exists whenever the government selects a course of action at least in part ‘because of’ its adverse—or beneficial—effects upon a

respect to mixed motivations and concerns about burden shifting,¹⁵⁵ discriminatory purpose would be established and strict scrutiny review would be triggered if the plaintiff could show that the state's desire to achieve racial diversity was "a motivating factor in the decision" to implement a percentage plan.¹⁵⁶ Of course, even if one were to concede that a court would apply strict scrutiny to percentage plans, this would not necessarily dictate a finding that such plans are unconstitutional. At least one commentator has suggested that, although race-neutral affirmative action programs, such as percentage plans, would be subjected to strict scrutiny, they would likely survive such scrutiny.¹⁵⁷

Professor Forde-Mazrui has suggested that race-neutral affirmative action plans will be subjected to strict scrutiny because:

Strict scrutiny under the Equal Protection Clause is triggered by a law motivated by a racially discriminatory purpose, regardless of whether the law employs an express racial classification or is race-neutral on its face. As the Supreme Court's affirmative action cases establish, the purpose to benefit racial minorities is a discriminatory purpose. Thus, when a state school intentionally seeks to admit minority students through the use of race-neutral criteria . . . it has acted with a discriminatory purpose.¹⁵⁸

Professor Forde-Mazrui's position, however, is that race-neutral affirmative action programs should survive such review precisely because they are race-neutral. This view sees the Court's affirmative action doctrine as an admonition against the effects of "racial classifications—as means—because of the harmful effects such means have both in the immediate impact of their operation and in their consequences for society at large."¹⁵⁹ From this perspective, the real evil the Court is attempting to "smoke out" through the use of strict scrutiny in affirmative action cases is the types of injuries created by the very operation of racial classifications such as "reinforcing racial stereotypes" and "exacerbating racial tensions."¹⁶⁰ Because race-neutral affirmative action carries a lesser likelihood of causing such injuries directly, there is less reason for the Court to strike down a governmental program where it is animated by a desire to remedy societal discrimination.¹⁶¹ The theory here is that given its perniciousness, remedying societal discrimination is a compelling governmental interest, if race-neutral

racial group.").

¹⁵⁵ See *Arlington Heights v. Metro. Hous. Corp.*, 429 U.S. 252, 270–71, 271 n.21 (1977).

¹⁵⁶ See *id.* at 265–66, 270 ("When there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference [for official actions] is no longer justified.").

¹⁵⁷ See Forde-Mazrui, *supra* note 143, at 2336.

¹⁵⁸ See *id.* at 2333.

¹⁵⁹ See *id.* at 2356–57.

¹⁶⁰ See *id.* at 2357.

¹⁶¹ See *id.* at 2352.

means are used, because such means are "sufficiently unobjectionable."¹⁶² From this perspective, the answer to our hypothetical plaintiff's objection is that the state's desire to achieve racial diversity through a race-neutral means, such as a percentage plan, simply does not amount to a violation of the Equal Protection Clause of the Fourteenth Amendment.¹⁶³

But an additional major response to our hypothetical plaintiff is founded on an observation of the current political reality. The fact that percentage plans are race-neutral and reward scholastic achievement as measured by comparison with a student's immediate peer group, has allowed enough of a political coalition to form to support creation of the programs, and perhaps even to insulate them politically from judicial override. I think it likely that, even under the Court's current disapproving approach to affirmative action, our hypothetical plaintiff's reverse discrimination challenge to a percentage plan would fail because of the political environment that has generated such plans. The explicit abandonment or prohibition of race-conscious affirmative action in some jurisdictions has not ended the desire for both racially diverse and academically solid public college and university classes, and there is significant political pressure to prevent those institutions' resegregation.¹⁶⁴ Using percentage plans, "merit" will be assured by basing admission decisions on the student's high school record as opposed to their performance on a single examination—by many lights an eminently fairer indicator of effort, achievement, and future academic promise.¹⁶⁵ Such a system thus rewards a record of academic achievement and treats all students with similarly lofty class ranks in the state equally without regard to race. Along the "merit" axis, then, percentage plans are a textbook example of formal notions of equality.

Because percentage plans tie college and university admissions to an extremely traditional and widely accepted indicia of merit—performance in high school, it is simply less likely that the Court will find that they are unconstitutional.¹⁶⁶ From the perspective of the real rather than the ideal,

¹⁶² See *id.* at 2353.

¹⁶³ Dean Sullivan has put it even more bluntly: "It is simply not the case that uncovering a purpose to increase racial diversity, in the absence of racially discriminatory means, simultaneously reveals a proxy policy to be a 'subterfuge' for discrimination against whites." Sullivan, *supra* note 144, at 1048.

¹⁶⁴ See Jeffery Rosen, *Damage Control: The Unintended Consequences of Proposition 209 Have Forced Some of its Stauncher Supporters to Reconsider. But is it too late?*, THE NEW YORKER, Feb. 23 & Mar. 2, 1998 at 58, 64 (reporting that the "pressure [to maintain diversity] comes from minority voters and the candidates who court them, who believe that the institutions training California's leaders should reflect the state's population, and from the students themselves").

¹⁶⁵ See *supra* Part II.

¹⁶⁶ See GIRARDEAU A. SPANN, RACE AGAINST THE COURT: THE SUPREME COURT AND MINORITIES IN CONTEMPORARY AMERICA 20 (1993) (arguing that the socialization process through which Supreme Court justices are chosen "all but ensures their sympathy toward

percentage plans, with their purported emphasis on "merit," provide a "big umbrella" approach to affirmative action and function as an attractive diversity enhancement mechanism that many holding significantly differing views on affirmative action can endorse. "Diversity," as a broad goal when pursued by race-neutral means that emphasize effort and educational achievement, is a theme which many Americans can support as a political matter because of the widespread acceptance of fairness as a bedrock American value.¹⁶⁷

Of course, this does not mean that progressives and civil rights activists have embraced percentage plans. Many have not.¹⁶⁸ Race-neutral affirmative action mechanisms such as percentage plans have appeared to fill the vacuum created in the wake of the absence of *Bakke*-style affirmative action. As progressives have pointed out, their very attraction—race-neutrality—also makes them a less dependable mode through which to deliver the highest number of Blacks and Hispanics to higher education.¹⁶⁹ Progressives have wisely and correctly pointed out that percentage plans do little to enhance racial diversity in graduate education and have often had a deleterious effect on the numbers of Blacks and Hispanics enrolled at the more "elite" campuses within state university systems.¹⁷⁰ Progressives have also noted that without adequate recruitment, outreach, application information, and improved access to advanced placement courses and other education supports, percentage plans will fail to provide both racial diversity and equal educational opportunity.¹⁷¹

But the discussion about percentage plans from the progressive camp has suffered from a certain poverty of vision. The stakes at play in this discussion are exceedingly high; in putting forward percentage plans, the state has consciously selected a method for diversifying its colleges and universities that utilizes the segregation of its secondary schools to achieve that end. In so doing, it asks us to ignore its role in contributing to the segregated and inferior conditions below. To allow this moment to pass without comment is to risk absolving the state, at least

majoritarian values").

¹⁶⁷ For example, in an examination of racial attitudes among Whites, Lawrence Bobo, James R. Kluegel, and Ryan A. Smith, reported that White support of affirmative action policies varied significantly based upon the type of policy at issue. The authors suggest that policies "that aim mainly to increase the human capital attributes of blacks are comparatively popular," but that policies that "lean toward achieving equal outcomes, [or] preferences for minorities that ignore merit considerations" will be opposed. Lawrence Bobo et al., *Laissez-Faire Racism: The Crystallization of a Kinder, Gentler, Antiblack Ideology*, in *RACIAL ATTITUDES IN THE 1990'S: CONTINUITY AND CHANGE* 27 (Steven A. Tuch & Jack K. Martin eds., 1997).

¹⁶⁸ See U.S. COMM'N ON CIVIL RIGHTS, *supra* note 5; see also Bragg, *supra* note 8 (noting Black leaders' concern that the "plan would cripple college admissions of blacks").

¹⁶⁹ See U.S. COMM'N ON CIVIL RIGHTS, *supra* note 5, at 3 (noting that percentage plans are "an ineffective replacement program when compared with . . . previous affirmative action polic[ies]").

¹⁷⁰ See Berry, *supra* note 4, at A48.

¹⁷¹ See *id.*; see also U.S. COMM'N ON CIVIL RIGHTS, *supra* note 5.

symbolically, of its past actions and the concomitant responsibility for current harm.

Progressives and civil rights activists, back on their heels in a defensive stance, have engaged in a dialogue that has essentially urged two approaches: that race-conscious preferential affirmative action be restored, or that race-neutral affirmative action, which has lately taken the form of percentage plans, function more effectively to guarantee the same level of minority representation throughout state higher education as had obtained in an earlier era. I agree wholeheartedly with both of these rhetorical positions. But political pressure exerted against the resegregation of institutions of higher education is not the same as political pressure exerted against the resegregation of primary and secondary education, which is accelerating.¹⁷² My view is that, properly reconceived, the question should not be whether percentage plans yield the same result as had obtained in an earlier period. The more fundamental question is whether percentage plans are an unconscionable attempt to remedy one evil by employing the worst features of another. This moment, then, is a fitting occasion for a reassessment of the deeply segregated and unequal state of our nation's secondary schools and the state's role in creating this reality. Only then can we ask: where do we go from here?

V. PHILOSOPHY, MORALITY AND THE ROLE OF THE STATE AS THE GUARANTOR OF EQUAL OPPORTUNITY

The irony of percentage plans is that they seek to create racial diversity while assuming and relying on racial segregation. However, percentage plans also provide the state with a unique opportunity. My view is that percentage plans represent a recognition of the state's responsibility for primary and secondary education's failure to serve Black and Hispanic children. Out of this recognition must come responsibility, and the state must recognize that the segregated and inferior conditions I have discussed above must be ameliorated. But why should the state do anything? For the moment, let us assume that the state's actions that have helped to create the present reality would not be recognized as violating the United States Constitution, as it has been interpreted by the United States Supreme Court, such that a federally enforceable obligation to ameliorate the present conditions might arise.¹⁷³ But if that is the case, why then should the state

¹⁷² See Orfield & Yun *Study*, *supra* note 15, at 5.

¹⁷³ See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37-38 (1972) (holding that education is not a fundamental right). This, of course, does not mean that I would not make such an argument in another context. Indeed, in many instances state law has been interpreted to require that all students be provided with an adequate or equal education. See, e.g., James E. Ryan, Sheff, *Segregation, and School Finance Litigation*, 74 N.Y.U. L. REV. 529, 534-35 (1999). It may well be that state law would require many states to undertake the kind of policy prescriptives that I and others recommend. See, e.g., Powell, *supra* note 20. My project

take any affirmative step toward amelioration if it is neither involved in nor fears litigation?

The answer is that states are not simply one-dimensional entities existing only to be sued and to zealously defend their interests in a court of law. Instead, government should be understood as an avenue or vessel of the good life, as a guarantor, *inter alia*, of baseline notions of equality. As Bruce Ackerman and Anne Alstott have recently urged, "the central task of government is to guarantee genuine equality of opportunity."¹⁷⁴ If, in a state of nature, we ceded some of our liberty as independent and fully autonomous individuals to create a government, we did so for the betterment of all, for the fulfillment of equality.¹⁷⁵ This does not mean that state government must supply or guarantee equal outcomes, including equal income or equal wealth. Instead, the state should provide a baseline level of "means-regarding" equality.¹⁷⁶ That is, every person in the state should have the same opportunity to generate the same income, the same wealth, and the same opportunities for advancement and personal fulfillment—the same good life.¹⁷⁷

In our twenty-first century knowledge and information-based society, an equal and effective education is an absolutely essential precondition for achieving that equal opportunity for the good life.¹⁷⁸ But one's education cannot be equal

here, however, is to argue that states have an obligation and responsibility, independent of court order and crystallized by percentage plans, that requires them to pursue a course of racial and socioeconomic desegregation of residential areas and public secondary schools.

¹⁷⁴ See BRUCE ACKERMAN & ANNE ALSTOTT, *THE STAKEHOLDER SOCIETY* 4 (1999).

¹⁷⁵ See RONALD DWORKIN, *SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY* 1 (2000) ("No government is legitimate that does not show equal concern for the fate of all those citizens over whom it claims dominion and from whom it claims allegiance.").

¹⁷⁶ See DOUGLAS RAE ET AL., *EQUALITIES* 66–67 (1981) (providing the following example of "[m]eans-regarding equal opportunity [as] [t]wo persons, j and k, have equal opportunities for X if each has the same instruments for attaining X") (citations omitted).

¹⁷⁷ Ralph Waldo Emerson's articulation of this concept is strikingly apt: "the genius of our country our true policy,—opportunity. Opportunity of civil rights, of education, of personal power, and not the less of wealth; doors wide open. . . . Let them compete, and success to the strongest, the wisest and the best." RALPH W. EMERSON, *The Fortune of the Republic*, in *MISCELLANIES* 541 (Edward E. Emerson ed., 1968).

¹⁷⁸ A recent Department of Labor study examining future employment trends was emphatic. The study, which continually stressed the impact of education on labor market outcomes, reported that the:

Demand for higher-skilled employees is a 50-year trend that has become increasingly important. Where strength and manual dexterity used to be enough to ensure employment and a comfortable standard of living, more jobs now and in the future will require verbal and mathematical, as well as organizational and interpersonal, [sic] skills. Emerging technologies, globalization, and the information revolution are also increasing demand for high-tech skills.

THE UNITED STATES DEPARTMENT OF LABOR, *FUTUREWORK: TRENDS AND CHALLENGES FOR WORK IN THE 21ST CENTURY* 77 (1999). Workers who are insufficiently skilled to compete in the twenty-first century workplace will be at an extreme disadvantage. Indeed, another section

and effective if it is materially inferior and racially segregated. And under our current system, equal opportunity is denied to large segments of whole classes of people solely because of their race, class, and neighborhood. They are denied the means necessary for achieving the good life which is the very essence of the concept of equality.¹⁷⁹ This is morally wrong and the state, as protector of liberty and as guarantor of equality, has an obligation to make right such a wrong.

Indeed, such a position is not without precedent. In 1988, the Connecticut State Department of Education issued a controversial report recommending that the state take "collective responsibility" for desegregating Connecticut's public schools.¹⁸⁰ The report was explicit in condemning segregation: "the premise underlying this report . . . is that segregation is educationally, morally and legally wrong."¹⁸¹ Given such a premise, the only course of action was to desegregate the state's public schools.¹⁸² Moreover, there is explicit language in the state constitution in each of our percentage plans states, Florida, Texas, and California, emphasizing the importance and centrality of education to those states' citizens. Indeed, education is such an important value in Florida and California that it has been recognized as a "fundamental right."

For instance, the importance of education is clearly delineated in Article IX, § 1 of the Florida Constitution; it is of the highest importance.¹⁸³ Article IX, § 1 describes the "education of children" as a "fundamental value" and explicitly places responsibility on the state to make "adequate provision for the education of all children residing in the state."¹⁸⁴ The newly amended version of that section emphasizes the importance of a superior education in mandatory terms stating that it is the "paramount duty" of the state to make "adequate provision . . . for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education"¹⁸⁵

of the study cautioned that "African-Americans and Hispanics continue to lag behind in college attendance. This means that these minority groups lack access to many of the skills that higher education provides." *Id.* at ix.

¹⁷⁹ See generally DWORKIN, *supra* note 175.

¹⁸⁰ See CONN. STATE DEPT. OF EDUC., A REPORT ON RACIAL/ETHNIC EQUITY AND DESEGREGATION IN CONNECTICUT'S PUBLIC SCHOOLS 11 (1988).

¹⁸¹ See *id.* at 1.

¹⁸² See *id.*

¹⁸³ FLA. CONST. art. IX, § 1 (amended 1998).

¹⁸⁴ See *id.*; see also Coalition for Adequacy and Fairness in Sch. Funding, Inc. v. Chiles, 680 So. 2d 400, 409-10 (Fla. 1996) (Overton, J., concurring) ("[E]ducation is the key to unlocking the door to freedom and keeping it open . . . the right to an adequate education is a fundamental right for the citizens of Florida under our Florida Constitution.").

¹⁸⁵ See FLA. CONST. art. IX, § 1 (amended 1998); see also Volusia County v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126, 137 n.6 (Fla. 2000). Indeed, the language of Article IX is so sweeping that the Florida Constitution Revision Commission noted that it "provides guidance and standards for equal educational opportunities and provides a basis for legal challenge if the system does not meet the standards." See Fla. Const. Revision Comm'n, Analysis of Revisions for the November 1998 Ballot (Revision 6), at

While education has not achieved the status of a fundamental right under the Texas Constitution, the state's responsibility to provide for an adequate education is clear. The Texas Constitution charges the state legislature with making "suitable provision for the support and maintenance of an efficient system of public free schools."¹⁸⁶ This "suitability provision" is violated "if the Legislature substantially default[s] on its responsibility such that Texas school children [are] denied access to that education needed to participate fully in . . . opportunities available in Texas."¹⁸⁷ In addition, the Texas Constitution explicitly provides that "a general diffusion of knowledge [is] essential to the preservation of the liberties and rights of the people."¹⁸⁸

In California, education has achieved the status of a fundamental right. As early as the 1920s, the California Supreme Court provided that "the education of children of the state is an obligation which the state took over to itself by the adoption of the constitution."¹⁸⁹ Under the California Constitution, the "general diffusion of knowledge and intelligence" is "essential" and the legislature is instructed to "encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement."¹⁹⁰ By the 1970s, the California Supreme Court was willing to take the importance of education even further and held that "the distinctive and priceless function of education in our society warrants, indeed compels, our treating it as a 'fundamental interest.'"¹⁹¹ In the 1980s, the judiciary reaffirmed this notion emphasizing the fundamental nature of education as promised in the California Constitution and noting that "a child's public education is too important to be left to the budgetary circumstances and decisions of individual families."¹⁹²

As currently conceived, percentage plans operate against a background of racial segregation and provide a remedy for lack of racial diversity in higher education. But percentage plans are an inadequate remedy for the systematic disadvantage associated with attending racially segregated schools; once a state has recognized this disadvantage, it must do more. The foundation of the state's obligation arises out of its own past actions, the effect that those past actions have today, the state's own recognition of that fact, and from the state's role as a guarantor of equality. The foundation of the state's obligation lies in the organic

<http://www.law.fsu.edu/crc/tabloid.html> (last visited July 18, 2000).

¹⁸⁶ TEX. CONST. art. VII, § 1.

¹⁸⁷ See *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717, 736 (Tex. 1995).

¹⁸⁸ TEX. CONST. art. VII, § 1.

¹⁸⁹ See *Piper v. Big Pine Sch. Dist. of Inyo County*, 193 Cal. 664, 669 (1924).

¹⁹⁰ CAL. CONST. art. IX, § 1.

¹⁹¹ *Serrano v. Priest*, 487 P.2d 1241, 1258 (Cal. 1971) (*Serrano I*). The central holding of *Serrano I* was upheld in 1976. See *Serrano v. Priest*, 557 P.2d 929 (Cal. 1976) (*Serrano II*). Later cases also confirmed that education was a fundamental interest. See, e.g., *Butt v. State*, 842 P.2d 1240, 1251 (Cal. 1992); *Steffes v. Cal. Interscholastic Fed'n*, 176 Cal. App. 3d 739, 749 (Cal. Ct. App. 1986).

¹⁹² *Hartzell v. Connell*, 679 P.2d 35, 43 (Cal. 1984).

law which establishes the fundamental obligation to correct past wrongs, create an equal and adequate educational system, and thereby create a more equal society.

Finally, advocates need to refocus their sights on solving this multi-valenced problem. In political struggle, as in life, "you get what you settle for." With few exceptions, the dialogue about percentage plans—often for reasons that are very understandable—has had a narrow and defensive quality.¹⁹³ The issue as framed by many progressives has been on preserving some level of racial diversity at state colleges and universities and, increasingly, on enhancing educational attainment in minority concentrated secondary schools.¹⁹⁴ These are laudable and exceedingly important goals. But to my mind, they will never come to pass without a sustained focus brought to bear in the political arena that emphasizes the segregated and inferior nature of minority concentrated schools and that demands an equal *and* desegregated educational environment, which is a predicate to full citizenship for every person in the United States. This has to be the articulated goal even as we, as realists, understand how difficult it will be to achieve. Without sustained pressure in the political arena, such an objective will never come to pass.

VI. POLICY PROPOSALS: DESEGREGATING OUR SCHOOLS, NEIGHBORHOODS, AND COMMUNITIES

Given the deeply intractable nature of the residential and school segregation that characterizes our metropolitan areas, there is no question it will require the active participation of all levels of government, including the federal government, to ameliorate this problem.¹⁹⁵ My focus here, however, will be on actions that should be taken by the states and their localities. First, as I have suggested, many minority children experience systematic disadvantage because of the segregated and inferior nature of our primary and secondary schools. Second, it is impossible to de-couple racial segregation in our schools from racial segregation in our neighborhoods. Third, because percentage plans are an inadequate remedy for such systemic disadvantage, the state has an obligation to do more than provide percentage plans to ameliorate the harms flowing from such disadvantage.

While I do not pretend to have all of the answers to this vexing problem, I want to make several policy suggestions regarding efforts that states should pursue to begin to ameliorate the disadvantage that is created by segregated neighborhoods and segregated schools. These prescriptions borrow from the excellent work done by Gary Orfield, Douglas Massey, Nancy Denton, Florence Roisman, John Powell, and many others who have recognized the profound

¹⁹³ See, e.g., Frank H.T. Rhodes, *College by the Numbers*, N.Y. TIMES, Dec. 24, 1999, at A19 (Percentage plans are a "route to expanding educational opportunity for underrepresented minorities [that] should be avoided by any university that has better choices.").

¹⁹⁴ See U.S. COMM'N ON CIVIL RIGHTS, *supra* note 5.

¹⁹⁵ See MASSEY & DENTON, *supra* note 95, at 217–18.

relationship between our schools and our neighborhoods. These proposals grow out of a fundamental belief that the most effective way to deliver quality schooling to systematically disadvantaged minorities is to provide for desegregated educational and housing opportunities.

As Gary Orfield and Susan Eaton have so eloquently urged, "the real choice about the future is between accepting resegregation and finding a path toward viable and lasting desegregation."¹⁹⁶ The reality, however, is that given the levels of minority concentration in our cities, and the fact that so many of our suburban areas are predominantly White, it is unrealistic to believe that any meaningful level of public school desegregation can occur without suburban assistance.¹⁹⁷ One might argue that the Supreme Court's 1974 *Milliken v. Bradley*¹⁹⁸ decision would obstruct any attempt to utilize the suburbs to desegregate city schools. *Milliken*, however, only tells us that notions of federalism dictate that the federal courts may not force states to redraw school district lines or the suburbs to submit to interdistrict busing in the absence of an interdistrict violation, not what the state might volunteer to do freely.¹⁹⁹

The fact that our large metropolitan areas have been (often artificially) divided into many separate political entities and independent school districts makes it difficult to even imagine a metropolitan response to the problem of segregated and inferior public schools. However, such a coordinated response is sorely needed.²⁰⁰ One possibility might be, as William Julius Wilson has suggested, to consolidate urban and suburban areas, thereby creating a "metropolitan government."²⁰¹ Such a government would have a shared tax base and could engage in "collaborative metropolitan planning, and the creation of regional authorities to develop solutions to common problems if communities fail to reach agreement."²⁰² Ultimately, the state is responsible for creating discrete

¹⁹⁶ See Orfield & Eaton, *supra* note 84, at 331, 354.

¹⁹⁷ See *id.* at 62–63 ("In 1986, the nation's twenty-five largest urban school districts served only 3 percent of whites. In metropolitan Atlanta . . . 98 percent of the area's white high school students attended suburban schools by 1986.").

¹⁹⁸ 418 U.S. 717 (1974).

¹⁹⁹ See *id.* at 752; see also *Missouri v. Jenkins*, 515 U.S. 70, 97–98 (1995).

²⁰⁰ As Orfield and Eaton have argued, the most stable desegregation plans are plans that include cities and suburbs. See Orfield & Eaton, *supra* note 84, at 63–64. They add that such desegregation plans are most useful because such plans:

[I]ncrease stability by raising the costs of flight and creating better options for those who stay. In such communities, high-status families have to be concerned about the schools serving the poor since their children share the same schools. Business must care because there is nowhere else to go for workers. Such plans create a vested area-wide interest in success and they have the demographic stability needed to permit long-term efforts to upgrade

Id. at 355.

²⁰¹ WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS* 220 (1996).

²⁰² *Id.*

political subdivisions, drawing school district lines and for the provision of public education itself.²⁰³ If the state has the power to draw school district lines, it can also modify them voluntarily in order to achieve an important public goal such as desegregating public schools and integrating regional housing markets.²⁰⁴ Once this occurs it is easier to imagine a "metropolitan" response to a significant region-wide problem in the same manner that we approach region-wide transportation challenges or environmental harms.²⁰⁵ From this perspective, it is easier to see individuals as inhabiting part of a shared community, as opposed to inhabiting a world apart, and to see programmatic responses to segregated and inferior education as unifying as opposed to trammeling sacrosanct district lines, disrupting solid communities, and destroying neighborhood schools.²⁰⁶

But what does it mean to advocate a metropolitan response? One answer is to disaggregate the notion that a student, particularly a high school student, must attend a neighborhood school. This can be accomplished in a variety of ways, including redrawing school district lines so that more Black and Hispanic students are eligible to attend predominantly White schools, because there is "nothing sacrosanct about the current location of [school district] boundaries."²⁰⁷ One

²⁰³ A state's power over its cities has been called "absolute." GERALD E. FRUG, *CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS*, 17 (1999). In *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907), the Supreme Court characterized the state's power with respect to cities to include the ability to "expand or contract the territorial area." The development of the doctrine of "home rule" has not altered this result. FRUG, *supra* at 17 ("[M]ost state constitutions have been amended to grant cities the power to exercise 'home rule.' But cities are free of state control under home rule only on matters purely local in nature. And, nowadays, little if anything is sufficiently local to fall within such a definition of autonomy."). Although most states delegate power to provide for a public education to a state agency, school district, or some combination of both, the final responsibility for the provision of public education remains with the state. This is certainly the case with respect to our percentage plan states. In Florida, for all practical purposes, school districts are "agent[s] of the state." Op. Fla. Att'y Gen. 069-12 (1969). In California, the state legislature retains power over local school boards, and "the state . . . has plenary powers in all school district affairs." *Butt v. State*, 842 P.2d 1240, 1251 (Cal. 1992) (quoting *Tinsley v. Palo Alto Unified Sch. Dist.*, 91 Cal. App. 3d 871, 880-81 (Cal. App. Ct. 1979)). The situation in Texas is similar. Texas statutory law defines school districts as "political subdivision[s]" that is, as "local government entit[ies] created and operating under the laws of [the] state." TEX. NAT. RES. CODE ANN. § 191.003 (4) (2000).

²⁰⁴ See generally John Charles Boger, *Toward Ending Residential Segregation: A Fair Share Proposal for the Next Reconstruction*, 71 N.C. L. REV. 1573 (1993) (advocating for a centralized approach that would provide incentives for municipalities to create integrated housing opportunities).

²⁰⁵ See WILSON, *supra* note 201, at 220.

²⁰⁶ See, e.g., *Milliken v. Bradley*, 418 U.S. 717 (1974) (Marshall, J., dissenting) ("The city of Detroit and its surrounding suburbs must be viewed as a single community. Detroit is closely connected to its suburbs in many ways, and the metropolitan area is viewed as a single cohesive unit by its residents.").

²⁰⁷ See FRUG, *supra* note 203, at 185 ("These boundary lines have long been relied on—

possibility would be to re-draw school district lines so that racial and socioeconomic integration was achieved.²⁰⁸ In addition, states could also liberalize transfer policies so that students could attend the school of their choice, residence notwithstanding.²⁰⁹ States should insure not only that transfers are freely available throughout the state to the school of a student's choice, but as Orfield and Eaton have argued, states should also "provide the information systems, the transportation, the counseling, and other elements needed to make this [transfer] opportunity genuinely available to low-income segregated minority families."²¹⁰ Perhaps most importantly, under no circumstance should a state allow any transfer to take place that would increase segregation.²¹¹

Along similar lines, percentage plans themselves might well have unappreciated benefits. In providing an early and insightful comment on Texas' Ten Percent Plan, Professor David Orentlicher suggested that percentage plans might create incentives to improve the quality of public schools and to enhance racial diversity at the college and university level.²¹² His view was that a shift to a percentage plan system removes a built-in advantage that many students who attend "stronger" schools enjoy.²¹³ From this perspective, parents seeking to maximize their child's chances of attending a public college or university in a percentage plan state would have an incentive to either relocate to a different district or transfer their child to a "weaker" school, in effect betting that their child would become a top student in a less competitive environment.²¹⁴ Over time, this would have beneficial spill-over effects: "[i]f parents adjusted their choices of school districts, the wealthier and more influential among them would spread their wealth and political influence over a wider range of schools."²¹⁵ According to Orentlicher, the increase in quality would then indirectly enhance minority representation at state colleges and universities because "minority students would

and schools have been located—to ensure the separation of different kinds of students. They could now be redrawn with the opposite result in mind.”).

²⁰⁸ See MCUSIC, *supra* note 86, at 131.

²⁰⁹ See FRUG, *supra* note 203, at 187 (asserting that children should not be given a preference to attend a school in a particular district simply because “their parents can[] afford to buy a house nearby”).

²¹⁰ Orfield & Eaton, *supra* note 84, at 355. Without such supports, unfettered school choice may exacerbate rather than ameliorate racial segregation. See *id.* See generally Betsy Levin, *Race and School Choice*, in *SCHOOL CHOICE AND SOCIAL CONTROVERSY* 266 (Stephen D. Sugarman & Frank R. Kemerer eds., 1999).

²¹¹ See Orfield & Eaton, *supra* note 84, at 355. The history of “freedom of choice” plans does not suggest that they will perform a desegregative function unless the governmental entity involved takes affirmative steps to ensure that they necessarily will function in such a fashion. See *Green v. County Sch. Bd. of New Kent County*, 391 U.S. 430, 441–42 (1968).

²¹² See David Orentlicher, *Affirmative Action and Texas' Ten Percent Solution: Improving Diversity and Quality*, 74 NOTRE DAME L. REV. 181 (1998).

²¹³ See *id.* at 190.

²¹⁴ See *id.*

²¹⁵ *Id.*

be less disadvantaged by having to attend weak schools.”²¹⁶

It remains to be seen whether this will prove to be an unintended benefit of percentage plans. It would be hugely advantageous if percentage plans could effect the market such that school quality is improved and minority attendance at public universities and colleges is enhanced.²¹⁷ But the question is whether White parents will so value the promise of admission to a state college or university that they will relocate or transfer their child to a predominantly Black and/or Latino high school such that meaningful desegregation of *those schools* might occur.²¹⁸ Perhaps some number of them might. But it is unlikely that the incentives created by percentage plans will, by themselves, significantly affect secondary school segregation.²¹⁹ This only reminds us of the fact that a variety of other factors must also be altered in order to create meaningful change at the secondary school level, that is, to desegregate our schools and our neighborhoods.²²⁰ Finally, even if Orentlicher’s prediction comes to pass (and I sincerely hope that it will), the irony that percentage plans create remains.

What else can be done? School funding should not depend solely upon the

²¹⁶ *Id.* at 191.

²¹⁷ Early indications suggest, however, that parents are more willing to pressure schools to engage in subterfuge to “pack” as many students as possible into the top ten percent, than to relocate or transfer in order to game their child’s chance of gaining automatic admission to a state college or university. See Daniel Golden, *Fudge Factor: Some High Schools Finagle to Cram Kids into Top 10% of Class*, WALL ST. J., May 15, 2000, at A1 (reporting that “admissions rules based on class rank are susceptible to manipulation—particularly by the elite high schools that stand to lose the most”).

²¹⁸ Evidence from perhaps the most prominent magnet program ever undertaken that was intended to improve both the quality of inner-city schools and to desegregate them, suggests that even where an extraordinary amount of money is spent on augmenting programs, improving teaching, and enhancing facilities, that White families remain resistant to attending predominately Black schools. See Orfield & Eaton, *supra* note 84, at 241, 262 (evaluating the Kansas City, Missouri Metropolitan School District magnet schools program and finding that: “[w]ith respect to the second goal—attracting new white students into the district—it is hard to judge the remedy a success”).

²¹⁹ It might be useful to analogize percentage plans to magnet schools on the theory that each provides a kind of “carrot” to White parents. The results of magnet programs, however, do not suggest a basis for optimism. *Id.* at 262 (“Magnets, when used alone, are simply not powerful enough to overcome the economic and demographic trends that have increased the racial isolation of the inner city.”).

²²⁰ An emphasis on the incentives that percentage plans might create also raises other problems because such incentives can cut both ways. Assuming that it is true that percentage plans create incentives for private actors to engage in particular types of behaviors, a closely related question is whether such plans also create *disincentives* for minority students to seek desegregated educational environments at the high school level. After all, why should a minority student either move to a more diverse neighborhood or seek to transfer to a more integrated school if she reasonably believes that she would not be among the top graduates in her new high school class?

assessed value of the real property in a particular school district.²²¹ Additional state funding should be provided so that all school districts within a state receive the same amount of funding per pupil, providing equal educational opportunity to every student in the state.²²² In making this assertion, however, I do not suggest that equalizing school financing is an effective substitute for meaningful school desegregation, but it is an important component of equal educational opportunity. The predominant goal should be "racial and socioeconomic integration."²²³

Given the interrelationship between schools and housing, the state must also take affirmative steps to desegregate our neighborhoods and metropolitan areas. There are a variety of avenues that the state might pursue in this regard. First, as Massey and Denton have argued, an effort must be made to stem the "institutionalized process of neighborhood racial turnover, which is the ultimate mechanism by which the ghetto is reproduced and maintained."²²⁴ One way to begin this process is to enhance fair housing enforcement mechanisms. For instance, states and localities should step up fair housing enforcement to prevent discrimination by the real estate, financial, and insurance industries.²²⁵ Along those lines, states should also strengthen the state and local agencies that process many fair housing complaints.²²⁶

However, reliance on fair housing enforcement with its case-by-case approach will not provide a systematic solution to the problem of residential segregation.²²⁷ Instead, anti-residential discrimination efforts should be systematic, affect entire metropolitan areas, and must also anticipate prospective region-wide development and growth. As Orfield and Eaton remind us, it is highly likely that there will be "vast growth of suburban minority school enrollment in the next generation and massive movement of whites to outer suburbs, but most suburbs have no experience and few tools for dealing with segregation and racial transition."²²⁸ States must have a plan that anticipates (and hopefully controls) growth such that meaningful metropolitan-wide residential integration can be assured.

More specifically, states should promote "inclusionary" zoning, the

²²¹ See MCUSIC, *supra* note 86, at 98 ("Because no state draws its school district boundaries to equalize the value of property in each district, districts are able to raise differing amounts of money for their schools. Property-rich districts can finance abundantly with lower property taxes; property-poor districts can provide inadequate finances even with high taxes.").

²²² See *id.* at 99 ("[I]n no state does the supplemental funding actually eliminate spending inequalities.").

²²³ See James E. Ryan, *Schools, Race and Money*, 109 YALE L. J. 249, 256 (1999).

²²⁴ MASSEY & DENTON, *supra* note 95, at 229.

²²⁵ See Orfield & Eaton, *supra* note 84, at 357.

²²⁶ See JOHN YINGER, *CLOSED DOORS, OPPORTUNITIES LOST: THE CONTINUING COSTS OF HOUSING DISCRIMINATION* 221 (1995).

²²⁷ See Boger, *supra* note 204, at 1581-85 (explaining deficiencies of case-by-case approach under the Fair Housing Act of 1968).

²²⁸ See Orfield & Eaton, *supra* note 84, at 357.

"construction of affordable housing in places where it otherwise would not be built."²²⁹ If necessary, the states can achieve this end by overriding the interests of municipalities in pursuing exclusionary zoning policies.²³⁰ States should also provide for increased funding for the development of affordable housing in areas that deconcentrate poverty and race through state housing finance agencies.²³¹ Along these lines, one possibility that states should consider is the adoption on the state level of John Charles Boger's "National Fair Share Act" proposal that would stimulate residential integration on a metropolitan scale.²³² Boger's proposal imagined a federal statute, based loosely on New Jersey's *Mount Laurel* experience, that created an incentive for municipalities to meet goals of providing for racially and economically integrated housing on pain of withdrawal of those municipalities' federal mortgage interest and property tax deductions.²³³ The central genius of Boger's proposal is that it recognizes the importance of centralized planning while at the same time undercutting the effects of exclusionary zoning. Under Boger's proposal, the appropriate state agency was directed to "calculate the extent of residential segregation and of low-income housing need in each region [of the state] and . . . to assign to each municipality a fair share of the ascertained regional need."²³⁴ Using the Boger plan as a model, states might designate integration and affordable housing goals on a region-wide basis that each municipality, particularly developing municipalities and suburban areas, would then be required to meet.²³⁵

The states should also institute housing mobility strategies because the "concentration of minority households in poor neighborhoods has become one of the most dramatic features of residential segregation."²³⁶ As the federal housing

²²⁹ Andrew G. Dietderich, *An Egalitarian's Market: The Economics of Inclusionary Zoning Reclaimed*, 24 FORDHAM URB. L.J. 23, 26 (1996).

²³⁰ See Florence Wagman Roisman, *Sustainable Development in Suburbs and Their Cities: The Environmental and Financial Imperatives of Racial, Ethnic, and Economic Inclusion*, 3 WIDENER L. SYMP. J. 87, 115-16 (1998).

²³¹ See Florence Wagman Roisman, *The Lessons of American Apartheid: The Necessity and Means of Promoting Residential Racial Integration*, 81 IOWA L. REV. 479, 522 (1995) (reviewing DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993)); Michael H. Schill, *Race, the Underclass, and Public Policy*, 19 LAW & SOC. INQUIRY 433, 452 (1994) (same).

²³² See Boger, *supra* note 204.

²³³ See *id.* at 1573-74.

²³⁴ *Id.* at 1603-04.

²³⁵ Indeed, California currently requires that each county and city develop a comprehensive plan with a "housing element." CAL. GOV'T CODE § 65302(c) (1999). Consequently, each local government must create a plan that complies with a "regional fair-share housing allocation" that "seek[s] to reduce the concentration of lower income households in cities or counties which already have disproportionately high proportions of lower income households." W. DENNIS KEATING, *THE SUBURBAN RACIAL DILEMMA* 37 (1994); see CAL. GOV'T CODE § 65584(a) (1999).

²³⁶ YINGER, *supra* note 226, at 234. For an early and insightful examination of the

program has shifted from a project-based program to one that provides portable housing subsidies directly to the recipient that can be used throughout a metropolitan area to secure rental housing in the private market, the possibilities for deconcentrating race and poverty have increased.²³⁷ While a "section 8" housing subsidy can help a recipient secure housing in a less racially and economically impacted area, additional supports are necessary to facilitate integrative moves.²³⁸ States can do much to enhance the ability of this program to achieve desegregation. For instance, states can provide information about integrated housing opportunities to recipients contemplating moves and improve funding for adequate childcare and transportation to recipients once they have relocated to suburban areas.²³⁹ Finally, because perceptions of discrimination and harassment in some neighborhoods often deters section 8 recipients from engaging in desegregative moves, states should redouble their efforts to fight housing discrimination generally, and discrimination against section 8 recipients specifically.²⁴⁰

VII. CONCLUSION

The recent adoption of percentage plans in three of the most populous states in the union—California, Florida, and Texas—highlight a compelling moment in the American struggle to achieve the promise of equal opportunity for all. These percentage plans are emblematic of the ironies embedded in our post-affirmative action era: they were conceived of as a means to secure some racial diversity in public higher education, while avoiding unfashionable and constitutionally

possibilities that housing mobility strategies hold for deconcentrating race and poverty see, Florence Wagman Roisman & Hilary Botein, *Housing Mobility and Life Opportunities*, 27 CLEARINGHOUSE REV. 335 (1993). See generally, LEONARD S. RUBINOWITZ & JAMES E. ROSENBAUM, CROSSING THE CLASS AND COLOR LINES: FROM PUBLIC HOUSING TO WHITE SUBURBIA (2000); HOUSING MARKETS AND RESIDENTIAL MOBILITY (G. Thomas Kingsley & Margery Austin Turner eds., 1993); HOUSING MOBILITY: PROMISE OR ILLUSION? (Alexander Polikoff ed., 1995); MARGERY AUSTIN TURNER & KALE WILLIAMS, HOUSING MOBILITY: REALIZING THE PROMISE (1998).

²³⁷ See generally David P. Varady & Carole C. Walker, *Vouchering Out Distressed Subsidized Developments: Does Moving Lead to Improvements in Housing and Neighborhood Conditions?*, 11 HOUS. POL'Y DEBATE 115 (2000).

²³⁸ See generally James E. Rosenbaum, *Black Pioneers—Do Their Moves to the Suburbs Increase Economic Opportunity for Mothers and Children?* 2 HOUSING POL'Y DEBATE 1179 (1991).

²³⁹ See Roisman, *supra* note 230, at 114.

²⁴⁰ See Margery Austin Turner et al., *Section 8 Mobility and Neighborhood Health: Emerging Issues and Policy Challenges*, (April 2000), available at http://www.urban.org/community/sec8_mobility.html (recommending that "if state or local laws prohibit discrimination based on source of income, the local housing agency may want to consider initiating complaints against landlords who refuse to accept Section 8 tenants on this basis").

problematic race-conscious preferential affirmative action. In this article, I probe the central irony of these plans: they can only succeed in achieving racial diversity in higher education if educational institutions at the lower levels remain segregated. The irony is intensified when we remember that the very states that now institute percentage plans were key actors in creating the residential and educational segregation that those plans rely upon for their effectiveness.

This paradoxical situation, at first glance, seems like an infinite loop or an unsolvable puzzle. Progressives and civil rights advocates have reacted by proffering two arguments: restore race-conscious preferential affirmative action, or adjust race-neutral affirmative action so that the overall number of minorities in higher education is not reduced. While I do not disagree with either of these positions, I believe that the inquiry must go deeper and the goals must be loftier. The fundamental question, I believe, is this: can percentage plans, which embody governmental acknowledgement of the systematic disadvantage created by segregated, inferior secondary schools, adequately remedy *that* disadvantage?

When we unpack the baggage embedded in percentage plans, this is what we see: that the state recognizes the systemic segregation that still abides in primary and secondary education today, and the state sees that this systemic segregation disadvantages minorities. Layered upon this is the traditional American notion that government should guarantee an equal playing field upon which all comers can attempt to achieve the American dream, unhindered by prejudice based on race, color, or creed. Given this, the spotlight should be the nature of the obligation that is conferred upon the state as a result of this confluence of circumstances.

While current Supreme Court jurisprudence may not confer an obligation upon the state to address this reality under the United States Constitution, I argue that a profound and compelling obligation is created nonetheless. The political conversation regarding percentage plans, I believe, is narrow: the left is constricted by the incremental judicial erosion of affirmative action, and the right more resolute than ever in its belief that to take race into account in any manner is a constitutional violation of the most significant magnitude. I believe we must move the tenor of the conversation to another level. In the current environment, percentage plans may seem like a quick fix to achieve a certain metrics for minority representation in public institutions of higher learning. But until we address the segregated and inferior education received by many minority children, which is in turn intertwined with persistent residential segregation, percentage plans will never address more than the tip of the iceberg. If we turn our backs on this task, we risk abandoning the promise of equal educational opportunity for all Americans.